BELLSOUTH

ME COSTN REGULATORY AUTH.

BellSouth Telecommunications, Inc.

333 Commerce Street

Suite 2101

Nashville, TN 37201-3300

*02 JAN 9 PM 3

Joelle J. Phillips Attorney

January 9, 2002

EXECUTIVE SECILE IA Fax 615 214 7406

joelle.phillips@bellsouth.com

VIA HAND DELIVERY

David Waddell, Executive Secretary Tennessee Regulatory Authority 460 James Robertson Parkway Nashville, TN 37238

> BellSouth Tennessee, Against of XO Inc. Complaint Re:

Telecommunications, Inc.

Docket No. 01-00868

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth's Emergency Motion to Quash or, in the Alternative, Emergency Motion for Protective Order. Copies of the enclosed are being provided to counsel of record.

Cordially,

a Welly

JJP:ch

BEFORE THE TENNESSEE REGULATORY AUTHORITY Nashville, Tennessee

In Re:

Complaint of XO Tennessee, Inc. Against BellSouth Telecommunications, Inc.

Docket No. 01-00868

EMERGENCY MOTION TO QUASH OR, IN THE ALTERNATIVE, EMERGENCY MOTION FOR PROTECTIVE ORDER

Pursuant to T.C.A. § 4-5-311, TRA Rule 1220-1-2.11, and Tenn. R. Civ. P. 26.03, BellSouth Telecommunications, Inc. ("BellSouth") respectfully moves that the Hearing Officer enter a protective order: (1) requiring that the depositions sought by complainant take place in the city of the deponents' residence or place of work; (2) requiring the complainant to first take the depositions of lower level employees and that the complainants then be allowed to depose BellSouth corporate officers Richard A. Anderson (President, Customer Markets - BellSouth Corporation), David Scoby (President, Small Business Services), and Krista Tillman (former President, BellSouth Small Business Services, currently BellSouth State President in North Carolina) only if the complainant demonstrates that relevant information is available only from these officers; (3) requiring the complainant to initiate discovery by issuing a request for a 30.02(6) designee and identifying the topics for such discovery or, in the alternative, providing a listing of issues pursuant to TRA Rule 1220-2-.11(3); (4) ruling that BellSouth is under no obligation to produce unaffiliated third parties; and (5) requiring the parties to reach a mutually acceptable schedule for the order of those depositions that will proceed.

In light of the date for which the depositions are noticed, BellSouth respectfully requests that this motion be heard at the hearing set in this docket on January 10, 2002.

DISCUSSION OF AUTHORITY

Tennessee Rules of Civil Procedure are made applicable to this proceeding pursuant to T.C.A. § 4-5-311. Like the Federal Rules of Civil Procedure, Tennessee's rules provide for the issuance of protective orders to avoid undue burdens in the discovery process. Pursuant to both Tenn. R. Civ. P. 26.03 and Fed. R. Civ. P. 26(c), trial courts possess broad discretion to fashion orders protecting parties from unduly burdensome discovery requests when the movant demonstrates good cause in light of the facts of a particular case. *See, e.g. Deitchman v. E.R. Squibb & Sons,* 740 F.2d 556, 566 (7th Cir. 1984).

I. Depositions Must Be Taken in the City Where the Witnesses are Located.

Complainant has served a deposition notice for the deposition of nine witnesses (attached hereto as Exhibit "A"). Of those nine witnesses, only two reside and work in Nashville, Tennessee.¹ While BellSouth does not object to producing corporate representatives as witnesses for depositions, and while

As set forth in the Affidavit of Patrick Turner, attached as Exhibit "B," witnesses Michael Sisk and Robin Porter reside and work in Nashville, Tennessee. The other witnesses are located as follows: Kathy Finn resides and works in Atlanta, Georgia; Don Livingston resides and works in Atlanta, Georgia; Richard E. Tice resides and works in Birmingham, Alabama; Richard A. Anderson resides and works in Atlanta, Georgia; David Scoby resides and works in Atlanta, Georgia; Krista Tillman resides and works in Charlotte, North Carolina; Peggy Maxwell is not employed by BellSouth or by any entity that is affiliated with BellSouth.

BellSouth has no objection to making the non-officer deponents available for telephone depositions, BellSouth does seek a protective order imposing the well-established discovery rule that requires a party seeking discovery to depose corporate representatives at the location where the witness resides or works.

The support for BellSouth's position on this issue is simply overwhelming. As one Tennessee court has explained, "It is well settled that the deposition of a corporation by its agents and officers should ordinarily be taken at its principal place of business, especially when . . . the corporation is the defendant." *Dunn v. Standard Fire Ins. Co.*, 92 F.R.D. 31, 32 (E.D. Tenn. 1981) (citing *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979)). *See also Thompson v. Sun Oil Co.*, 523 F.2d 647, 650 (8th Cir. 1975) (affirming trial court decision to require depositions of corporate agents at corporate defendant's principal place of business) (attached as Exhibit 3); *Shannon v. TAESA Airlines*, 1994 WL 931216 at *1 (S.D. Ohio Nov. 10, 1994) (applying general rule identified in *Dunn*) (attached as Exhibit "D"); *Trans-Pacific Ins. Co. v. Trans-Pacific Ins. Co.*, 135 F.R.D. 385, 392 (E.D. Pa. 1991) (same); *Farquhar v. Shelden*, 116 F.R.D. 70, 72 (E.D. Mich. 1987)

Reliance upon federal decisions as support for BellSouth's position is appropriate in the context of this discovery dispute. Indeed, "[b]ecause the Tennessee Rules of Civil Procedure are patterned from the Federal Rules of Civil Procedure, decisions under the federal rules are persuasive authority in the construction and interpretation of our rules." Continental Cheshire Assocs. v. AGS Cheshire Assocs., 1986 WL 14444 at *2 (Tenn. App. Dec. 22, 1986) (citing Moredock v. McMurry, 527 S.W.2d 462 (Tenn. 1975) and Hixson v. Stickley, 493 S.W.2d 471 (Tenn. 1973)) (attached as Exhibit "C"); accord Continental Cas. Co. v. Smith, 720 S.W.2d 48, 49 (Tenn. 1986).

(observing that "in the absence of unusual circumstances, a party seeking discovery must go where the desired witnesses are normally located"); Dollar Sys., Inc. v. Tomlin, 102 F.R.D. 93, 94 (M.D. Tenn. 1984) (restating general rule identified in Dunn); Harper v. Applied Power, Inc., 1980 WL 308 at *1 (W.D. Tenn. Aug. 28, 1980) (applying general rule identified in Dunn) (attached as Exhibit "E"); General Leasing Co. v. Lawrence Photographic Supply, Inc., 84 F.R.D. 130, 131-32 (W.D. Mo. 1979) (applying general rule identified in Dunn); Deep South Oil Co. of Texas v. Metropolitan Life Ins. Co., 21 F.R.D. 340, 342 (S.D.N.Y. 1958) (applying general rule identified in Dunn); Schreiber v. Carney, 1982 WL 8773 at *1 (Del. Ch. Dec. 3, 1982) (applying general rule identified in Dunn and noting that "in the absence of some agreement, a plaintiff is not entitled as a matter of right to depose defendants at the site of the forum") (attached as Exhibit "F"); Global Van Lines, Inc. v. Daniel Moving & Storage, Inc., 283 S.E.2d 56, 57 (Ga. App. 1981) (applying general rule identified in Dunn); Donahoo v. Matthews, 660 So.2d 391, 392 (Fla. App. 1995) (applying general rule identified in Dunn). Moreover, while it does not appear that any Tennessee state court has addressed this issue specifically in a reported decision, a leading authority on trial practice in this state confirms that, as a general rule, Tennessee state courts typically require a defendant or its agent to be deposed at the witness' "place of residence or business." See Lawrence A. Pivnick, Tenn. Circuit Court Prac., § 18-5 (2000 ed.).

In light of this considerable authority, it is clear that the complainant is precluded from requiring BellSouth employees who work and reside outside of Davidson County (and, in many instance, outside the state of Tennessee) to travel to Davidson County for depositions as a matter of right. Accordingly, the Hearing Officer should quash the deposition notice for those witnesses, or, in the alternative, enter a protective order that requires complainant to depose those witnesses in the cities where they reside or work.

The presumption in favor of the application of the general discovery rule discussed above is virtually ironclad. Indeed, in the absence of an unusual circumstance that would make the application of the general rule inequitable, a plaintiff consistently is required to depose corporate officers or agents at either in the [county or city] of their residence or at the corporate defendant's primary place of business. One court has explained this presumption as follows: "If a corporation objects to depositions at a location other than its principal place of business, the objection should be sustained unless there are unusual circumstances which would justify such an inconvenience to the corporation." *Zuckert v. Berkliff Corp.*, 96 F.R.D. 161, 162 (N.D. III. 1982) (emphasis supplied).

BellSouth's employees are not subject to deposition in Davidson County simply because BellSouth does business here. For example, in *Dunn*, the defendant was a Minnesota-based insurance company that did business in Tennessee. Notwithstanding this fact, the court saw no reason to deviate from the general

practice of taking the deposition of a corporate officer or agent at the corporate defendant's principal place of business. *See Dunn*, 92 F.R.D. 32. Likewise, in *Shannon*, the court refused to make corporate representatives of a Mexican airline submit to deposition in Ohio despite the fact that the airline did business in Ohio. *See Shannon*, 1994 WL 931216 at *2. Based on this authority, it is readily apparent that doing business in a particular jurisdiction does not qualify as the sort of exceptional circumstances requiring departure from the general rule regarding the location of depositions of corporate employees or representatives. Consequently, the Court should not uphold the deposition notice on this basis.

Based on the above considerations, it is clear that the instant case does not involve any unusual circumstances that would make it inequitable for complainant to depose BellSouth's witnesses where they are located. Moreover, the obvious constitutional issues implicated by an attempt by a state agency to require parties, outside the state, to travel to the state, clearly counsel in favor of application of the well-established rule requiring depositions to take place where the witness is located. Accordingly, consistent with Tennessee law, the Hearing Officer should either quash the deposition notice or enter an appropriate protective order.

II. Complainant Should Depose Lower Level Employees Before Corporate Officers.

Courts interpreting Rule 26 have often held that a protective order was warranted to prevent the deposition of a corporate defendant's officer prior to the deposition of lower level employees. For example, in *Baine v. General Motors*, 141

F.R.D. 332 (M.D. Al. 1991), the United States District Court for the Middle District of Alabama held that it was inappropriate to permit the plaintiff to depose a corporate officer of the defendant, because the plaintiff had not yet established that the information to be obtained from that corporate officer could not be obtained from lower level employees or other discovery mechanisms, including the deposition of a corporate designee.³ Moreover, the Court noted that by waiting to depose such a corporate officer until after preliminary discovery had been taken, the line of questioning for the corporate officer (in the event that it ultimately proved necessary for the officer to be deposed at all) would be developed and refined. Noting that those avenues had not yet been exhausted or even pursued, the Court found that the deposition should not proceed due to the disruption it would cause in the corporate responsibilities of the officer to be deposed.

In a similar case, the United States District Court for the Eastern District of Pennsylvania addressed a corporate defendant's motion seeking a protective order precluding the deposition of its president and members of its executive committee. First Fidelity Bancorporation v. National Union Fire Ins. Co. of Pittsburgh, 1992 U.S. Dist. LEXIS 3367 (E.D. Pa. 1992) (copy attached as Exhibit "G"). Even though the Court recognized the possibility that the corporate officers possessed relevant information, the Court nevertheless ruled that the depositions of lower

The Complainants have not asked BellSouth to designate a corporate representative who could testify as to designated matters, as they could have done pursuant to TRCP 30.02(6). As noted below, BellSouth respectfully suggests that the 30.02(6) process may provide a more appropriate method for this discovery.

level employees must proceed first and that the depositions of the corporate officers should proceed only if, after completing those depositions, the party still needed the testimony of the officers. *Id.* at *15. *See also Marisol v. Giuliani, et al.*, 1998 U.S. Dist. LEXIS 3719 (S.D.N.Y. 1998) (granting a protective order precluding deposition of mayor noting that deposition should not be permitted where official has not been shown to have unique personal knowledge that cannot be obtained elsewhere) (attached as Exhibit "H").

In the present case, BellSouth has been served with a notice of deposition purporting to require the depositions of nine witnesses,⁴ including the three corporate officers noted above. BellSouth proposes that until such time as the depositions of the six other witnesses have been completed, that BellSouth should be protected against the disruption to its business that will be caused by having Messrs. Anderson and Scoby and Ms. Tillman be among the first persons the complainants seek to depose. Instead, under the authority discussed above, the complainants should be allowed to depose these officers only they can demonstrate that no other persons at BellSouth can provide the information they wish to seek from these officers.⁵

As noted in the Turner Affidavit, one of the witnesses that complainant seeks to depose is not a BellSouth employee. Consequently, BellSouth lacks the power to produce the witness for deposition.

Notwithstanding the requirement of TRA Rule 1220-2-.11(3), complainant has not identified the issues on which it intends to depose these officers. If such depositions are permitted, the complainant should at the very least be required to identify the issues to be covered. It is not reasonable to permit the disruption of

III. Scheduling of the Depositions.

While the deposition notice purports to require the deposition on January 14, 2002 of nine defendants, counsel for complainant made no effort prior to serving the deposition notice to establish an order of witnesses on the date noticed, to establish a schedule on an alternative date that would be mutually convenient for the parties, or to discuss counsel's expectations regarding the length of the depositions for scheduling purposes. The lack of scheduling specific to each witness further exacerbates the disruption to BellSouth's business that would be caused by the depositions as noticed. As set forth in the Turner Affidavit, some of the witnesses noticed have numerous personal and business related conflicts on the date noticed. For example, Mr. Tice is scheduled to be in Birmingham on January 14th for the induced birth of a grandchild. In addition to this personal conflict, each of the officers noticed for depositions have substantial business conflicts during the day of the notice.

With respect to the scheduling and disruption caused by the schedule set forth in the deposition notice, BellSouth respectfully requests that a schedule be created to avoid pre-existing substantial conflicts for these witnesses and to minimize the delays as witnesses await the completion of other depositions.

BellSouth's business caused by such depositions to be exacerbated by an attempt to use the depositions as a general fishing expedition. For this reason, BellSouth suggests that this process may best be initiated by the TRCP 30.02(6) process.

BellSouth would be willing to make witnesses available for telephonic depositions in order to assist in scheduling.

CONCLUSION

For the reasons articulated above, BellSouth respectfully requests that a protective order be entered and that this motion be heard at the hearing set in this docket on January 10, 2002.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

Guy M. Hicks

Joelle Phillips

333 Commerce Street, Suite 2101 Nashville, Tennessee 37201-3300

(615) 214-6301

R. Douglas Lackey Patrick W. Turner 675 W. Peachtree Street NE, Suite 4300 Atlanta, Georgia 30375

CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2002, a copy of the foregoing document was served on the parties of record, via the method indicated:

Attorney General

Mail Section of the second of	Henry Walker, Esquire Boult, Cummings, et al. P. O. Box 198062 Nashville, TN 37219-8062
Hand Mail Facsimile Overnight	Chris Allen, Esquire Office of Tennessee Attorney P. O. Box 20207 Nashville, Tennessee 37202

EXHIBIT "A"

BEFORE THE TENNESSEE REGULATORY AUTHORITY NASHVILLE, TENNESSEE

in Re: Complaint of XO Tennessee, Inc.	
Against BellSouth Telecommunications,) Docket No. 01-00868
inc.	
Complaint of Access Integrated	
Networks, Inc. Against BellSouth	교) 환역 시작 시작 중 공장 및 교 시간
Telecommunications, Inc.	

NOTICE OF DEPOSITION

PLEASE TAKE NOTICE THAT pursuant to the Tennessee Rules of Civil Procedure and the ruling of the Hearing Officer at the November 30, 2001 pre-hearing conference, the Complainants will take deposition by oral examination of the following individuals before a notary public or other person authorized by law to administer oaths. The deposition will continue from day to day, subject to adjournments as may be agreed upon by counsel.

- 1. Peggy Maxwell. (The sales agent for BERRYDirect who made the sales offer attached to AIN's complaint.)
- 2. Kathy Finn. (Identified by BellSouth as the sales manager responsible for the sales channel involved in the sales offer described above. See BellSouth Response to Staff's 1st Data Request, Item 2.)
- 3. Robin Porter. (The sales agent for BellSouth who made the sales offer attached to XO's complaint.)
- 4. Michael Sisk. (Identified by BellSouth as the manager responsible for the sales channel involved in the sales offer described above. See BellSouth's Response to Staff's 1st Data Request, Item 2.)

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- 5. Don Livingston. (Identified by BellSouth as the sales manager with responsibility for the development of the offer of free service in connection with the 2001 Key Customer Program and training materials. See BellSouth's Response to Staff's 1st Data Request, Item 2.)
 - 6. Richard E. Tice. (The president of BellSouth Select, Inc.)
- 7. Richard A. Anderson. (President, Customer Markets, BellSouth Corporation. The individual with overall responsibility for all domestic wireline retail operations of BellSouth.)
 - 8. David Scobey. (President, BellSouth Small Business Services.)
- 9. Krista Tillman. (Former president BellSouth Small Business Services and currently BellSouth state president in North Carolina.)

The depositions will take place at 8:30 a.m. on January 14, 2002, in the Hearing Room of the Tennessee Regulatory Authority, 460 James Robertson Parkway, Nashville, Tennessee 37219.

All counsel of record are invited to attend and examine the deponent in accordance with the governing rules.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By:_

Henry Walker (BPR# 000272) 414 Union Street, Suite 1600

P.O. Box 198062

Nashville, Tennessee 37219

(615) 252-2363

Attorney for Access Integrated Network, Inc. and XO Tennessee, Inc.

CERTIFICATE OF SERVICE

Guy Hicks, Esq.
BellSouth Telecommunications, Inc.
333 Commerce St., Suite 2101
Nashville, TN 37201-3300

Henry Walker

0354475.01 093840-000 01/07/02 EXHIBIT "B"

BEFORE THE TENNESSEE REGULATORY AUTHORITY Nashville, Tennessee

In Re:

Complaint of XO Tennessee, Inc. Against BellSouth Telecommunications, Inc.

Docket No. 01-00868

AFFIDAVIT

- 1. My name is Patrick W. Turner and I am employed by BellSouth Telecommunications, Inc. ("BellSouth"), and my job title is Attorney Regulatory. I have held this position for approximately 1½ years. I have personal knowledge of the information contained in this Affidavit.
 - 2. The following individuals work and reside in the locations indicated:

Name	Work Address	Home Address
Richard Anderson	Atlanta, GA 30309	Alpharetta, GA 30022
Kathy Finn	Atlanta, GA 30319	Atlanta GA 30306
Don Livingston	Atlanta, GA 30319	Peachtree City, GA 30269
Robin Porter	Nashville, TN 37201	Nashville, TN 37215
David Scoby	Atlanta, GA 30319	Alpharetta, GA 30022
Michael Sisk	Nashville, TN 37201	Brentwood, TN 37027
Richard E. Tice	Birmingham, AL 35243	Cropwell, AL 35054
Krista Tillman	Charlotte, NC 28202	Charlotte, NC 28226

2. The call center out of which Ms. Peggy Maxwell worked was closed effective November 30, 1999. Ms. Maxwell, therefore, is no longer an employee

of BerryDirect, and she is not an employee of BellSouth Telecommunications, Inc. or of any BellSouth affiliate.

- 3. Mr. Tice, Mr. Anderson, Ms. Tillman, and Mr. Scoby each have scheduled appointments and obligations on January 14, 2002, which would preclude their attendance at a deposition on that date.
- 4. I have discussed this motion with counsel for complainant in an attempt to resolve this discovery dispute, but given the short timetable and the need to arrange for a resolution of this matter prior to Monday, January 14, 2002, the parties have not yet been able to resolve this issue.

FURTHER DEPONENT SAITH NOT.

Patrick W. Turner

Sworn to and subscribed before me, this 4th day of January, 20

Notary Public

My Commission Expires:

Notary Public, Pike County, Georgia My Commission Expires March 30, 2004 EXHIBIT "C"

1986 WL 14444

(Cite as: 1986 WL 14444 (Tenn.Ct.App.))

Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee, Western Section, at Jackson.

CONTINENTAL CHESHIRE ASSOCIATES, et al., Plaintiffs,

AGS CHESHIRE ASSOCIATES, et al., Defendant and Cross-Plaintiff/Appellees,

John H. VAN HOUTEN, II, Trustee, et al., Defendants to Cross-Complaint and Counter-Complainants/Appellants,

WIEN, LANE & MALKIN, et al., Defendants to Counter-Complaint/Appellees.

Dec. 22, 1986.

Shelby Equity No. 34

Hon. D.J. Alissandratos, Chancellor

Richard E. Charlton, III and Jeffrey D. Germany, of The Winchester Law Firm, Memphis, for appellants, John H. Van Houten, II, et al.

Ronald M. Harkavy of Harkavy, Shainberg, Kosten & Pinstein, Memphis, for appellees Wien, Lane And Malkin, et al.

TOMLIN, Presiding Judge, Western Section.

*1 John H. Van Houten II, et al, intervenors in the case of Continental Cheshire Associates v. AGS Cheshire Associates, (hereafter "Intervenors") have appealed from the decree of the Chancery Court of Shelby County denying their Motion for Relief from Judgment under Rule 60.02(4), T.R.C.P. The issue presented by their appeal is whether the chancellor erred in denying their motion. We hold that he did not and affirm.

The opening statement of the last and most recent opinion in this case written by this Court reads: "This litigation has a long history." History is still being made, as we have another aspect of this case before us. Just as we tried in the prior case to limit our review of the facts and pleadings to the issue under consideration, we will attempt to do so once again. In 1982 after being allowed to intervene in a

pending action in the Chancery Court of Shelby County styled Continental Cheshire Associates v. AGS Cheshire Associates, the intervenors filed a complaint later designated as a counterclaim against (among others) the New York law firm of Wien, Lane & Malkin and one of its partners (hereinafter referred to as "Defendants"). Certain acts of misfeasance were alleged against these defendants. Defendants filed a Motion to Dismiss supported by affidavits for lack of in personam jurisdiction. The chancellor ruled that in personam jurisdiction did not exist and dismissed the action as to these defendants. Intervenors utlimately perfected their appeal to this The action of the chancellor dismissing Intervenors' counterclaim against defendants was affirmed by an Opinion and Order of this Court filed Intervenors' application for in January, 1985. permission to appeal to the Supreme Court was denied in May, 1985.

In August, 1985 the Supreme Court of this state handed down its opinion in Masada Investment Corp. v. Allen, 697 S.W.2d 332 (Tenn.1985). The principal issue in Masada involved claims against a nonresident attorney. The trial court dismissed the suit as to the nonresident attorney for lack of in personam jurisdiction. In an opinion filed in April, 1984 this Court affirmed the action of the chancellor in Masada holding that the Tennessee courts lacked in personam jurisdiction over a Texas attorney who had rendered legal services involving certain transactions between a Tennessee limited partnership and a California limited partnership. Masada was under consideration by the Supreme Court when it denied certiorari in Continental Cheshire. Later, the Supreme Court reversed this Court's decision in Masada by holding that the Tennessee courts did have in personam jurisdiction over the Texas attorney.

Obviously motivated by the Supreme Court's opinion in Masada, Intervenors filed their motion in the Chancery Court of Shelby County pursuant to Rule 60.02, T.R.C.P., seeking to have the final judgment entered in the cause before us set aside, the effect of which would be to reinstate their counterclaim against the defendants. Intervenors' Motion for Relief from Judgment reads in part as follows:

*2 2. The Tennessee Court of Appeals based its ruling upon the case of Masada Investment Corp. v. Allen, which was decided by that Court on April 18, 1984, which was nine months before it decided this case. The Masada case also originated in this trial

1986 WL 14444 (Cite as: 1986 WL 14444, *2 (Tenn.Ct.App.))

court.

5. Movants rely upon T.R.C.P. 60.02 which states in pertinent part as follows:

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: ... (4) ... a prior judgment upon which it is based has been reversed or otherwise vacated, ... or (5) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time...."

Both in the Statement of the Issues presented for review and in the text of their brief before this Court, Intervenors have based their motion solely upon subsection (4) of T.R.C.P. 60.02, stating:

The Appellants brought their motion for relief from the said judgment under Rule 60.02(4) of the Tennessee Rules of Civil Procedure which provides that on motion and upon such terms as are just the Court may relieve a party or his legal representative from a final judgment, order, or proceeding if a prior judgment upon which the said judgment was based has been reversed or otherwise vacated.

As already noted, they contend that this Court's decision in Continental Cheshire was "based upon" the earlier decision of this Court in Masada. They also assert that the facts of Masada were very similar to the facts of Continental Cheshire and that in Continental Cheshire this Court used language, reasoning and conclusions identical to some found in Masada. While the latter assertion is true, the former is not. Addressing the latter assertion first, it is not unusual for a court when faced with similar factual situations to rely upon the same points and authorities previously relied upon in another case.

As for "basing" our decision in Continental Cheshire upon Masada, there is nothing in our Continental Cheshire opinion which in any way reflects that our decision therein was based specifically upon Masada. See Berryhill v. United States, 199 F.2d 217, 219 (6th Cir.1952) (applying Rule 60(b)(5), F.R.C.P.). No reference is ever made in Continental Cheshire to Masada. Our decision in Continental Cheshire was based upon a general application of the law as it existed at that time. None of the cases which this Court relied upon in deciding Continental Cheshire has been reversed subsequently by our Supreme

Court.

Our research has uncovered no Tennessee case interpreting and applying Rule 60.02(4), nor have we been furnished with any by counsel for either party to this appeal. However, it is to be noted that Rule 60(b) of the Federal Rules of Civil Procedure is identical insofar as the provisions thereof pertinent to this litigation are concerned. Because the Tennessee Rules of Civil Procedure are patterned from the Federal Rules of Civil Procedure, decisions under the Federal Rules are persuasive in the construction and interpretation of our rules. See Moredock v. McMurry, 527 S.W.2d 462 (Tenn.1975); Hixson v. Stickley, 493 S.W.2d 471 (Tenn.1973).

*3 Our research in the federal system reveals that both the text writers and the cases interpreting and applying Rule 60(b)(5), F.R.C.P., unswervingly support the action of the chancellor below and are completely contrary to the position taken by Intervenors. As will be shown hereafter, the one federal case relied upon by Intervenors has no application to the issue as presented by this appeal. Keeping in mind that the language in 60.02(4), T.R.C.P. is identical to that used in 60(b)(5), F.R.C.P., we now examine the cases and text writers in the federal system that address this rule.

In Title v. United States of America, 263 F.2d 28, (9th Cir.1959), affirming the action of the district court denying a motion to set aside a judgment under Rule 60(b)(5), the court stated:

Rule 60(b) was not intended to provide relief for error on the part of the court or to afford a substitute for appeal [citing cases]. Nor is a change in the judicial view of applicable law after a final judgment sufficient basis for vacating such judgment entered before announcement of the change [citing cases].

Id. at 31.

Berryhill v. United States, 199 F.2d 217 (6th Cir.1952) reviewed a case on appeal involving the denial of a Rule 60(b)(5) motion. That court stated:

It appears to be the settled rule that a change in the judicial view of the applicable law, after a final judgment, is not a basis for vacating a judgment entered before announcement of the change. Sunal v. Large, 332 U.S. 174 67 S.Ct. 1588, 91 L.Ed. 1982; Scotten v. Littlefield, 235 U.S. 407, 35 S.Ct. 125, 59 L.Ed. 289; United States v. Kunz, 2 Cir., 163

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'(Cite as: 1986 WL 14444, *3 (Tenn.Ct.App.))

F.2d 344; Lehman Co. v. Appleton Toy & Furniture Co., 7 Cir., 148 F.2d 988.

Id. at 219.

In Wallace Clark & Co. v. Acheson Industries, Inc., 394 F.Supp. 393, 395 n. 4 (S.D.N.Y.1975), it was stated:

Rule 60(b)(5) contemplates relief from a judgment as a result of a later change in the law such as when a statute is amended or when a prior judgment is reversed or modified. See, e.g., Class v. Norton, 507 F.2d 1058, 1061-62 (2d Cir.1974). Moreover, relief from a judgment on the latter grounds is restricted to situations where the present judgment is based on the prior judgment in the sense of res judicata or collateral estoppel. Rule 60(b)(5) does not apply where a case relied on as precedent by the court in rendering the present judgment has since been reversed. Title v. United States, 263 F.2d 28, 31 (9th Cir.), cert. denied, 359 U.S. 989; 79 S.Ct. 1118, 3 L.Ed.2d 978 (1959); Berryhill v. United States, 199 F.2d 217, 219 (6th Cir.1952); Loucke v. United States, 21 F.R.D. 305 (S.D.N.Y.1957). See 11 C. Wright & A. Miller, Federal Practice and Procedure § 2863 (1973).

A case in point is that of Collins v. City of Wichita, 254 F.2d 837 (10th Cir.1958). In that case the notice provisions of a Kansas condemnation statute had been upheld by the Supreme Court of the United States. Subsequently in another case between different parties but involving the same statute, the U.S. Supreme Court held that the notice provisions of the statute did not measure up to the requirements of the due process clause of the Fourteenth Amendment. Thereafter, the losing parties in the prior case filed a motion in the district court seeking relief under Rule 60, F.R.C.P. The trial court overruled the motion. In affirming the lower court, the Tenth Circuit said:

*4 Litigation must end some time, and the fact that a court may have made a mistake in the law when entering judgment, or that there may have been a judicial change in the court's view of the law after its entry, does not justify setting it aside [citing cases].

Id. at 839.

The case of Lubben v. Selective Service System Local Board No. 27, 453 F.2d 645, 650 (1st Cir.1972), provides an analysis of Rule 60(b)(5),

F.R.C.P. that addresses the "based on" concept:

For a decision to be "based on" a prior judgment within the meaning of Rule 60(b)(5), the prior judgment must be a necessary element of the decision, giving rise, for example, to the cause of action or a successful defense.... It is not sufficient that the prior judgment provides only precedent for the decision.

"It should be noted that while 60(b)(5) authorizes relief from a judgment on the ground that the prior judgment upon which it is based has been reversed or otherwise vacated it does not authorize relief from a judgment on the ground that the law applied by the court in making its adjudication has been subsequently overruled or declared erroneous in another and unrelated proceeding."

7 Moore's Federal Practice ¶ 60.26 [3] at 325.

[A] change in applicable law does not provide sufficient basis for relief under Rule 60(b)(5). See Title v. United States, 263 F.2d 28 (9th Cir.), cert. denied, U.S. 989, 79 S.Ct. 1118, 3 L.Ed.2d 978 (1959); Collins v. City of Wichita, 254 F.2d 837 (10th Cir.1958); Berryhill v. United States, 199 F.2d 217 (6th Cir.1952).

Wright and Miller, Federal Practice and Procedure: Civil § 2863, at 203-04, has this to say about Rule 60(b)(5):

The second ground, that a prior judgment upon which the present judgment is based has been revised or otherwise vacated, obviously is sound but also has had very little application. This ground is limited to cases in which the present judgment is based on the prior judgment in the sense of res judicata or collateral estoppel. It does not apply merely because a case relied on as precedent by the court in rendering the present judgment has since been reversed.

Intervenors cite but two federal cases as authority for their position. The first is Bailey v. Ryan Stevedoring Co., 443 F.Supp. 899 (M.D.La.1978) and the other, Radack v. Norwegian American Line Agency, Inc., 318 F.2d 538 (2d Cir.1963), which was also cited by the District Court in Bailey. A reading of these cases reveals that neither supports in any way the position of Intervenors. Bailey, as the citation in Intervenors' brief reveals, was reversed by the Fifth Circuit. Although it might technically be

1986 WL 14444 (Cite as: 1986 WL 14444, *4 (Tenn.Ct.App.))

said that it was "reversed on other grounds," it was reversed because the trial judge disregarded the Court of Appeals' mandate and charted the course reflected in his opinion. Not only was the course he charted erroneous, but the route that he took was erroneous as well.

In Bailey the District Court clearly decided the case on the basis of subsection (6) of Rule 60(b). This is evident from the fact that subsection (6) is referred to at least twice in the opinion. Furthermore, the quotation utilized in the observation--"But this Court feels that 'this is not an exorable rule, as indeed the Supreme Court has recognized,' " Id. at 900 (citing Wright and Miller, Federal Practice and Procedure: Civil § 2864)-- specifically refers to subsection (6) of Rule 60(b). Furthermore, all three cases cited by the District Court in its opinion deal with subsection (6), including Radack, supra, also relied upon by Intervenors.

*5 There is yet another reason for our questioning the applicability of 60.02(4), T.R.C.P., to the case under consideration. As we view it, the Supreme Court's decision in Masada did not reverse prior law. It merely extended or liberalized the application of existing law to the facts presented to it. constitutional test of due process as proscribed in International Shoe Co. v. State of Washington, 326 U.S. 310 (1945), cannot be converted into a litmus test to be mechanically applied to every in personam jurisdiction case. Each case must be decided on its See Perkins v. Benguet Consolidated own facts. Mining Co., 342 U.S. 413 (1952). At the time the Supreme Court denied the application for permission to appeal in Cheshire, it had heard arguments in Masada and had the case under advisement. It is

apparent that a factual distinction was drawn between the two cases. Accordingly, the decree of the chancellor is affirmed.

Defendants have filed a separate motion seeking to have this Court declare Intervenors' appeal to be frivolous, and to have damages awarded them pursuant to T.C.A. § 27-1-122. After giving this motion serious consideration, this Court is of the opinion that this appeal is frivolous. Our Supreme Court has held that where it appears that the appeal has no reasonable chance of success it is frivolous. In Liberty Mutual Insurance Co. v. Taylor, 590 S.W.2d 920, 922-23 (Tenn.1979), our Supreme Court held an appeal to be frivolous when "[t]he material issues raised by the appeal were issues of fact and there clearly was material evidence to support the trial judge's findings on those issues."

While here we are dealing with a question of law, all the viable authorities, both text writers and case law, are contrary to the position taken by the Intervenors. This cause is thus remanded to the Chancery Court of Shelby County for the fixing of damages pursuant to the above-cited statute, which will consist of court costs and all of defendants' reasonable expenses, including attorneys' fees incident to this appeal.

CRAWFORD, J., concurs.

Nearn, Judge, dissents in part.

I dissent from so much of the majority opinion that declares this appeal to be frivolous. In all else I concur.

END OF DOCUMENT

EXHIBIT "D"

1994 WL 931216 (Cite as: 1994 WL 931216 (S.D.Ohio))

Only the Westlaw citation is currently available.

United States District Court, S.D. Ohio.

Renee SHANNON, Plaintiff, v. TAESA AIRLINES, et al., Defendants.

No. Civ.A. 2:93-CV-689.

Nov. 10, 1994.

OPINION AND ORDER

KING, Magistrate J.

*1 Plaintiff, a resident of Columbus, Ohio, brings this action for monetary damages, alleging that she was sexually assaulted on a TAESA flight from Cancun, Mexico to Columbus, Ohio, while she was traveling as a passenger on a charter flight booked by co-defendant Apple Vacations. On October 7, 1994, defendant TAESA moved to dismiss, in part, on the ground that service of process was insufficient. Plaintiff has been granted to November 21, 1994, to respond to the motion to dismiss. Order (November This matter is now before the Court on 2, 1994). TAESA's motion for a protective order quashing the notice to depose TAESA's representative and asking 1) that plaintiff state with reasonable particularity the subject matter of the deposition, 2) that any future notice permit thirty days for compliance with the request for production of documents and tangible things, and 3) that any future deposition of its representative or representatives be conducted within a reasonable distance from the deponent's residence or principal place of business, i.e., Mexico City, Mexico.

On August 17, 1994, [FN1] plaintiff's counsel issued a notice of deposition (duces tecum), asking to depose an authorized representative, agent or employee of the defendant TAESA Airlines "who can speak concerning its policy and procedures relating to all aspects of TAESA's operations, including but not limited to its operations and employee manuals." Notice to Take Deposition (Duces Tecum) (August 17, 1994). The notice specified that the deposition would proceed in Columbus, Ohio.

FN1. Although a subsequent notice changing the date of the deposition was apparently issued, the file does not reflect the original of that notice.

In her Memorandum Contra the Motion for a Protective Order, plaintiff fails to address any contention other than the site of the proposed deposition, taking the position that the deposition should proceed in Columbus, Ohio. This Court agrees that the scope of the deposition seeking to depose an officer, agent or employee of defendant TAESA regarding "all aspects of TAESA operations, including but not limited to its operations in employee manuals," is over broad. Accordingly, plaintiff will be directed to narrow the scope of this deposition and to describe with reasonable particularity the matters on which examination is requested.

Moreover, the notice clearly fails to comply with Rules 30(b)(5), and 34(b), which grant to the party responding to a notice for deposition duces tecum thirty days in which to produce the requested documents and tangible things. Accordingly, the motion for protective order is meritorious in this regard as well.

The parties vigorously dispute the proper forum for conducting the deposition sought by plaintiff. While both parties acknowledge the general rule that a corporate defendant should be deposed at that defendant's place of business, see Dunn v. Standard Fire Ins. Co., 92 F.R.D. 31, 32 (E.D.Tenn.1981); 4 Moore's Federal Practice ¶ 26.70[1-3]; 8 Wright & Miller, Federal Practice and Procedure, Civil & 2112 n. 93, plaintiff takes the position that the facts involved in this case militate in favor of a departure from the general rule.

*2 It is true that, under Rule 26(c) of the Federal Rules of Civil Procedure, the Court is vested with the discretion to designate the location of a deposition, and to act so as to protect any party from undue burden or expense. In arguing that the deposition should proceed in Columbus, Ohio, plaintiff asserts that, although the defendant is a corporation "with substantial resources" Memorandum in Opposition to Defendant's Motion for Protective Order, at 2, the plaintiff "is an individual with very limited resources." Id. However, plaintiff has not submitted any financial data from which this Court can evaluate the accuracy of those assertions.

Plaintiff also points to flights allegedly conducted on TAESA's airlines between Cancun, Mexico and Columbus, Ohio, Cleveland, Ohio, or Pittsburgh, Pennsylvania, and offers to provide transportation for the TAESA representative from either Cleveland or Pittsburgh to the deposition in Columbus. This

1994 WL 931216 (Cite as: 1994 WL 931216, *2 (S.D.Ohio))

argument, however, overlooks the fact that the flights, although conducted by TAESA on its aircraft, are chartered to other entities; it is not at all clear that TAESA has the legal right to use any of the space on these flights for its own purposes.

More important to this Court's resolution of the dispute are the facts that TAESA is a foreign national and that there is yet unresolved in this case a question as to whether or not this Court is vested with personal jurisdiction over it. [FN2] These facts, combined with the plaintiff's failure to document her claim that being required to depose defendant's representative in Mexico City will pose an undue financial burden upon her, convince this Court that the motion for a protective order is meritorious.

FN2. There has apparently been no attempt on the part of the plaintiff to comply with the provisions of the Hague Convention on the Taking of Evidence abroad in civil or Commercial Matters, 23 U.S. T. 2555 (March 18, 1970) (codified at 28 U.S.C. § 1781), and neither party to the discovery dispute addresses the issue of whether or not the Hague Convention applies to this case. See Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct., S.D.Iowa,

482 U.S. 522, 107 S.Ct. 2542, 96 L.Ed.2d 461 (1987). See also Nationwide Mutual Ins. Co. v. Tryg Intl. Ins. Co., Ltd., C-2-94-64 (S.D.Ohio 1994).

The motion for a protective or is therefore GRANTED. The deposition of TAESA's representative may proceed only if plaintiff states with reasonable particularity the subject matter on which the deposition is to proceed, and allows thirty (30) days to comply with the request for production of documents and things, and only on the condition that the deposition proceed no more than a reasonable distance from the deponent's residence or principal place of business.

If any party seeks reconsideration of this Order, that party may, within ten (10) days, file and serve on all parties a motion for reconsideration by the Court, specifically designating this Opinion and Order, and the part thereof in question, as well as the basis for objection thereto. 28 U.S.C. § 636(b)(1); Rule 72(a), F.R.Civ.Pro.; Eastern Division Order 91-3(I)(F)(5).

END OF DOCUMENT

EXHIBIT "E"

1980 WL 308 25 Empl. Prac. Dec. P 31,501 (Cite as: 1980 WL 308 (W.D.Tenn.))

United States District Court, W.D. Tennessee, Western Division.

Hubert Harper, Plaintiff
v.
Applied Power, Inc., Defendant.

Civil Action No. 79-2612-M

August 28, 1980

MCRAE, J.

*1 Plaintiff, Hubert Harper, instituted this age discrimination and breach of contract action against defendant, Applied Power, Inc., on September 6, 1979. Plaintiff was initially hired by defendant and assigned to the company's sales force in 1958. He had risen to the position of Regional Sales Manager when his alleged termination occurred on December 27, 1978.

The jurisdiction of this Court is invoked pursuant to the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq., and 28 U.S.C. § 1331 federal question.

On May 9, 1980, plaintiff moved for an order compelling defendant to make available for deposition one Glenn Barnhill, Vice-President of the company. Plaintiff requested that Barnhill be deposed in the office of his legal counsel in Memphis, Tennessee. Defendant filed a motion for a protective order on the same day. Defendant did not object to the deposition of Barnhill by plaintiff. The company's objection centered on the location of the examination. It was defendant's contention that Barnhill be deposed at his residence or place of business in Milwaukee, Wisconsin.

The matter was referred to the U.S. Magistrate for disposition. On June 23, 1980, an order was entered requiring plaintiff "to depose Glenn Barnhill at the office of the corporate defendant, or at the home of Mr. Barnhill." Plaintiff now brings an objection to the Magistrate's Order before this Court.

It is well-settled that the deposition of a corporation through its officers and agents should ordinarily be taken at its principal place of business. 5 MOORE'S FEDERAL PRACTICE P 26.70 [1.-4] (2d ed. 1979). This general rule proves particularly true when the corporation is the defendant in a

lawsuit. 8 C. WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 2112 (1970). Because his matter is left to the discretion of the court, there have developed exceptions to the general rule. These exceptions are, however, uniformly based upon the peculiar circumstances presented by particular cases. See 4 MOORE'S FEDERAL PRACTICE P 26.70 [1.-3] n. 1 & 2 (2d ed. 1979) and cases cited therein.

Before the Magistrate, plaintiff contended that Glenn Barnhill should be deposed in Memphis, Tennessee, because plaintiff was unable to bear the expense of deposing the Vice-President at defendant's principal place of business in Milwaukee, Wisconsin. Plaintiff further maintained that the mere allegation that defendant engaged in age discrimination justified entry of an order varying the general rule. The Magistrate concluded that these "factors" were not "sufficiently unique to avoid the application of the general rule." This Court most emphatically agrees.

The standard of review in cases such as these is whether the decision of the Magistrate is clearly erroneous or contrary to law. 28 U.S.C. § 636(b)(1). Plaintiff has clearly failed in his attempt to meet this burden.

It is therefore Ordered that the Decision of the Magistrate is affirmed.

Order on Discovery Disputes, June 19, 1980

ALLEN, Magistrate:

Plaintiff in this cause filed motion for an order compelling defendant Applied Power, Inc., to make available for deposition one Glenn Barnhill, Vice-President of defendant, in the office of counsel for plaintiff in Memphis, Tennessee. Defendant Applied Power, Inc., filed a motion for protective order, opposing the taking in Memphis of the deposition of Glenn Barnhill.

While there is discretion in the Court, it will be presumed that the defendant will be examined at his residence or place of business or employment, and if proper objection is made to a notice naming some other place, such rejection will normally be successful. 4 MOORE'S FEDERAL PRACTICE P 26.70 [1.-3] (2nd.ed. 1979).

Counsel for plaintiff argued that, because of the

1980 WL 308 (Cite as: 1980 WL 308, *1 (W.D.Tenn.))

costs involved in going to Milwaukee, Wisconsin, to take this deposition; the shortage of funds on the part of his client (who was, according to the complaint, wrongfully terminated by defendant, because of his age); and because of the fact that this is an Age Discrimination in Employment Action, exceptional circumstances exist to justify the exercise of this Court's discretion in varying the general rule.

These factors do not appear to be sufficiently unique to avoid the application of the general rule. Plaintiff will therefore be required to depose Glenn Barnhill at the office of the corporate defendant, or at the home of Mr. Barnhill. This deposition will be taken at plaintiff's expense. Of course, should Mr. Barnhill appear in this jurisdiction, his deposition may be taken here.

It is so Ordered.

Order on Discovery Dispute, October 22, 1980

Defendant his filed requests for production of documents and interrogatories, directed to plaintiff herein. Plaintiff has filed responses thereto, along with certain objections. Defendant has now filed a motion to compel responses to those unanswered requests for production and interrogatories, and this dispute was referred to the United States Magistrate.

Three items of this dispute may be dealt with together. In defendant's request for production of documents numbered two and three, and in defendant's interrogatory number eleven, information is requested from plaintiff regarding Wholesaler's d/b/a Authorized Equipment Services Inc., Equipment Service. This business is apparently owned by plaintiff and his family, and plaintiff apparently went to work at this business after his allegedly discriminatory termination by defendant (which is the subject of this litigation). Defendant has requested plaintiff to produce State and Federal Business Income Tax Returns for this company for the last two (2) years; all financial statements prepared for this company from January 1, 1978 to the present; and the identification by plaintiff of all payments or benefits by this company to or for the benefit of any relative of the plaintiff during the last Plaintiff has objected to these two (2) years. requests on grounds that this information is irrelevant, immaterial, and not reasonably calculated Additionally, to lead to admissible evidence. plaintiff has complained of the disclosure of confidential information. Defendant, on the other

hand, has indicated that this information may be relevant to establish mitigation of plaintiff's damages.

*3 Given the rather low threshold requirements of FED. R. CIV. P. 26 (b)(1)(such evidence will be discoverable if it "appears reasonably calculated to lead to the discovery of admissible evidence"), the State and Federal Business Income Tax Returns, and financial statements, for Wholesaler's Equipment Service Inc., for the past two (2) years may lead to admissible evidence on the issue of mitigation of damages. Plaintiff will thus be required to produce these documents, subject to the limitation that these documents must be maintained in a confidential status, made available only to counsel for the parties or to experts selected by either party to testify in this cause. Such experts, before examining these documents, must be made aware of this order and be advised that the confidentiality of this information must be preserved.

However, there has been no showing that information regarding payments or benefits by Wholesaler's Equipment Services Inc., to or for the benefit of any relative of the plaintiff, would be relevant or material, or would lead to the discovery of admissible evidence. Plaintiff will therefore not be required to respond to interrogatory number eleven.

The dispute involving interrogatory number five has been narrowed somewhat by counsel in the process of filing briefs and replies thereto. While other objections might have been made, the specific objection by plaintiff was that this request violated the provisions of Local Rule 9 (g), limiting to thirty (30) the number of interrogatories a party may ask without leave of court. On that basis, this interrogatory is not objectionable, and the motion to compel will be granted.

Defendant, in interrogatory number seven, asked plaintiff to "describe the legal theory or theories upon which Count II of the Complaint is based". Such an interrogatory is totally improper, and is inconsistent with the rule that a pleading should contain a "short and plain statement of the claim showing that the pleader is entitled to relief ...". FED. R. CIV. P. 8 (a). Should defendant feel that Count II is inadequately stated, apartial motion to dismiss, or a motion for a more definite statement may be filed. Defendant did not choose to do so, but filed an appropriate answer thereto, indicating that there was an understanding as to what was claimed. The

1980 WL 308 (Cite as: 1980 WL 308, *3 (W.D.Tenn.))

motion to compel, regarding interrogatory number seven, is denied.

Plaintiff is given twenty (20) days from the entry of this order to respond to those interrogatories or requests for documents to be answered under the terms of this order.

It is so Ordered.

END OF DOCUMENT

EXHIBIT "F"

1982 WL 8773

(Cite as: 1982 WL 8773 (Del.Ch.), 8 Del. J. Corp. L. 401)

Court of Chancery of Delaware, New Castle County.

SCHREIBER

y. /

No. 6202

December 3, 1982

Plaintiff filed a stockholder's derivative action against Jet Capital Corporation, Texas International Airlines, Inc. and eight individual directos of Texas International Airlines, Inc. Plaintiff requested that a deposition be taken in New York City at the office of plaintiff's counsel, or in the alternative, the plaintiff requested the deposition be taken in Delaware—the forum state.

The two named defendants in the notice of deposition were to furnish information both individually and on behalf of the corporation. Since neither of these two individuals resided in New York, they requested a more suitable location. As the parties were unable to reach agreement, the defendants moved for a protective order.

Defendants asserted that neither of the proposed locations was appropriate as travel to these locations would have significantly interfered with their respective business activities.

Defendants, in reliance upon the general rule governing depositions of individual defendants, asserted that their residences would have been the proper place for the depositions. They also asserted that as they were to testify in their corporate capacity, the general rule provides for such a deposition to occur at the corporation's principal place of business, although they noted that the rule is not inflexible.

Vice-Chancellor Hartnett held that the general rule governing depositions should be applied unless there are circumstances which warrant deviation. Since the court has complete discretion in the matter of this nature, the vice- chancellor noted that none of the circumstances in the present case warranted deviation. Thus, he held that the depositions were to be taken at the principal's place of business in Dallas, Texas. In closing, he noted that such lack of good faith on the part of the parties involved to resolve this impasse constitutes a major factor in the backlog of cases within the judicial system.

[1] Depositions 54

122k54 k.

In the absence of a voluntary agreement or unusual circumstances, the deposition of an individual defendant is taken at his residence or place of employment and the deposition of a corporation, through one of its directors, is taken at the principal place of business of the corporation.

[2] Depositions \$\infty\$9 122k9 k.

[2] Depositions \$\sim 54\$ 122k54 k.

The standards for determining the place for discovery are not inflexhible and the place of deposition is a matter within the discretion of the court.

[3] Federal Civil Procedure \$\infty\$1359 170Ak1359

In the absence of an agreement between the parties, a plaintiff is not entitled to depose defendants at the site of the forum.

**403 Samuel R. Russell, Esquire, of Biggs & Battaglia, Wilmington, DE for plaintiff.

Rodman Ward, Jr., Esquire, of Skadden, Arps, Slate, Meagher & Flom, Wilmington, DE for defendants.

HARTNETT, Vice-Chancellor

*1 This is my decision on defendants' Motion For A Protective Order providing that their depositions be taken where they reside or work. I conclude that the nonresident defendants who are directors of corporate defendant Texas International Airlines, Inc. should not be deposed at their residences or places of employment but rather in Dallas, Texas, the principal place of business of Texas International Airlines, Inc.

This stockholder's derivative action was filed by Leonard I. Schreiber (plaintiff) against Jet Capital Corporation, Texas International Airlines, Inc. and eight individual directors of Texas International Airlines, Inc. Plaintiff's notice of deposition requests defendant-directors Howard Swanson and Carl Pohland to come to the New York City office of

plaintiff's New York counsel to furnish testimony both individually and on behalf of Texas International Airlines, Inc.

Since the defendants neither reside nor work in New York City, they attempted to reach agreement with plaintiff as to a more suitable location. Plaintiff's alternate proposal is that defendants be deposed in Delaware—the forum state. This proposal, defendants say, is likewise inappropriate. Defendants, in their motion, alternatively requested that their depositions be taken in Dallas—the principal place of business of the corporation.

Because of the parties' failure to agree, defendants have moved for a protective order based upon affidavits that Mr. Swanson resides and works in Florida and that Mr. Pohland has his residence and place of employment in Minnesota. Furthermore, defendants voice opposition to the New York and Delaware locations because travel to these location would allegedly significantly interfere with their activities. It is these business respective circumstances which defendants assert mitigate against subjecting them to travel to either New York or Delaware for the purpose of depositions.

(1) It is well settled that in the absence of a voluntary agreement or unusual circumstances, the deposition of an individual defendant is taken at his residence or place of employment and the deposition of a corporation, through one of its directors, is taken at the principal place of business of the corporation. Dalton v. American Investment **404 Co., Del. Ch., C.A. #6305-N.C. (June 9, 1981); Brywil, Inc. v. STP Corp., Del. Ch., C.A. #404-K (March 31, 1975); WRIGHT & MILLER, Federal Practice and Procedure, Civil § 2112; 4 MOORE SFederal Practice, ¶36.70[1-3]. The policy of these rules is one of practicality and concern for the cost to the party to be deposed. Dalton, supra.

In this case, however, the defendant-directors fall into two categories. They are individual defendants and also directors of the corporate defendant. In view of this circumstance, defendants rely on two theories to support their position. First, they urge that their depositions in both capacities should be taken in accordance with the rule governing depositions of individual defendants. Secondly, they urge that in any event this Court and other Courts have permitted a corporation's deposition at a place other than the corporation's principal place of business and therefore they should each be deposed at their homes.

*2 (2) The standards for determining the place for discovery are not inflexible and the place of deposition is a matter within the discretion of the Court. Chancery Court Rule 26(c); Lasher v. Sterwin Laboratories, Del. Ch., C.A. #5924-N.C., C.A. #6000-N.C. (January 28, 1980). While defendants are correct that there is authority for permitting a corporation's deposition at a place other than the principal place of business, this is not the general rule. Moreover, the cases cited by the defendants, while holding that a party may take a corporation's deposition at a place other than the principal place, of business, also required the payment of expenses by the party seeking the discovery or some other voluntary agreement between the parties. Dalton, supra; Lasher v. Sterwin Laboratories, supra; Brywil, Inc. v. STP Corp., supra.

from the general rule governing the taking of the deposition of a corporation through its directors at the principal place of business of the corporation. Plaintiff asserts that he resides in New York and is the owner of but a few shares of stock in Texas International Airlines, Inc. and it would be unfair to require him to bear the costs of travel to Dallas, Texas; that defendants have substantial contacts with New York and Delaware; and that travel to New York and Delaware would not disrupt the defendants' business activities.

(3) The fact, however, that a plaintiff in a stockholder's derivative suit merely asserts that he is the owner of a small number of shares does not provide any basis for departing from the general rule. See Lavine v. Gulf Coast Leaseholds, Inc., Del. Ch., C.A. #639-N.C. (August 11, 1961). Likewise, in the absence of some agreement, a plaintiff is not entitled as a matter of right to depose defendants at **405 the site of the forum. Compare, Dalton, supra; Lasher, supra. And finally, based upon defendants' affidavits, defendants have denied that they have substantial contacts with New York and Delaware and assert that travel to either of these locations would substantially interfere with their business activities.

The underlying policy considerations are that the costs to the deponent be minimized and that the costs of litigation be limited, if possible. In balancing these two policies, it is obviously more practicable here to require the depositions be taken at one place and the most logical place is the principal place of business of Texas International Airlines, Inc. in Dallas.

1982 WL 8773

(Cite as: 1982 WL 8773, *2 (Del.Ch.), 8 Del. J. Corp. L. 401, **405)

Considering all the circumstances, I therefore find in the interest of judicial efficiency and economy that the depositions by plaintiff of the defendant-directors, both individually and on behalf of Texas International Airlines, Inc., be taken in Dalls, Texas—the principal place of business of Texas International Airlines, Inc.

This matter is an excellent example of why this Court is falling steadily behind in its work. The dispute as to where the depositions should be taken could have easily been resolved by the parties if all had desired in good faith to resolve the impasse. Even when the Court's aid became necessary it should have been obvious that the issue was quite simple and was clearly within the Court's discretion. A letter of a few pages would have easily set forth the issue. Instead, the Court received formal briefs and a request for oral argument—a request which was

fortunately rejected. The objectors (defendants) chose to incorrectly cite 13 authorities for their wrong assertion that the general rule is that a deposition of a corporation, through its directors, is taken at the residence of the directors. It is no wonder that discovery procedures have become the subject of vigorous criticism throughout the country.

*3 Hopefully, in the future, counsel in this case will proceed to get this matter ready for trial in an expeditious manner without further need to burden the Court to decide where a deposition is to take place.

IT IS SO ORDERED.

END OF DOCUMENT

EXHIBIT "G"

1992 U.S. Dist. LEXIS 3367, *

FIRST FIDELITY BANCORPORATION, Plaintiff, v. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA Defendant, and FINANCIAL INSTITUTIONS RESERVE RISK RETENTION GROUP, INC. Defendant and Cross Claimant.

CIVIL ACTION NO. 90-1866

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

1992 U.S. Dist. LEXIS 3367

March 5, 1992, Filed

CASE SUMMARY

PROCEDURAL POSTURE: Defendant deponent filed a motion for a **protective order** precluding plaintiff deposing **party** from taking the depositions of certain **high ranking** executives within the deponent's corporation.

OVERVIEW: The deposing **party** sought the deposition of the deponent's chief officer of a subsidiary corporation and the president of the deponent's corporation at the relevant time. The deposing **party** also sought the deposition of the entire executive committee of the deponent's board of directors. The court held that (1) the depositions of the chief executive officer and the president were relevant in that they appeared reasonably calculated to lead to the discovery of admissible evidence; (2) a second deposition of the same **party** was permissible as long as it went beyond the information the deponent had previously given; (3) the deposing **party** should first **depose** the lower level employees before deposing the **high ranking** executives; (4) the deposing **party** could obtain the same information sought from the executive committee through a less burdensome and intrusive means, such as interrogatories; and (4) the deposing **party** should be required to take the deposition at a location in the vicinity in which the deponents reside or work.

OUTCOME: The court granted the protective order in part and denied in part.

CORE TERMS: deposition, discovery, notice, settlement, protective order, depose, underlying litigation, interrogatories, deposed, designated, deponent, convenient forum, lower level, handling, high ranking, directly relevant, declaration, burdensome, reschedule, deposing, modify, designate, mutually, jointly, settlement conference, originally scheduled, choice of forum, undue burden, precluding, scheduled

CORE CONCEPTS - + Hide Concepts

Civil Procedure: Disclosure & Discovery: Protective Orders

Fed. R. Civ. P. 26(c), provides in pertinent part that upon motion by a **party** or the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in

the district where the deposition is to be taken may make any order which justice requires to protect a **party** or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the **party** seeking discovery.

Civil Procedure: Disclosure & Discovery: Protective Orders

★ It is in the court's discretion to issue orders to protect parties in taking depositions. It is highly unusual for a court to absolutely prohibit the taking of a deposition. The burden is on the party moving for the protective order to show "good cause" before their motion is granted. The movant cannot just make broad allegations of harm, unsubstantiated by specific examples or articulated reasoning but must demonstrate that there is a particular need for the protection due to the possibility of significant harm.

Civil Procedure: Disclosure & Discovery: Relevance

It is true that a request for nonparty discovery requires a stronger showing of relevance than for simple **party** discovery. However, it is also true that for discovery purposes relevancy is broadly construed and is not limited to the precise issues set forth in the pleadings or to the merits of the case.

Civil Procedure: Disclosure & Discovery: Undue Burden

★Before **high ranking** executives are deposed, the plaintiff should first attempt to **depose** the lower level employees.

Civil Procedure: Disclosure & Discovery: Undue Burden

★It is within the court's discretion to designate the appropriate location for a deposition. Fed. R. Civ. P. 26(c)(2). As a general rule, if a deponent lives a substantial distance from the deposing party's residence, the deposing party should be required to take the deposition at a location in the vicinity in which the deponent resides.

COUNSEL: [*1] FOR FIRST FIDELITY BANKCORPORATION, PLAINTIFF AND COUNTER-DEFENDANT, GARY R. BATTISTONI, STUART A. LAW, JR., DANIEL J. DALTON, RICHARD E. RUFFEE, SANDRA L. YKEMA, DRINKER, BIDDLE & REATH, BROAD & CHESTNUT STREETS, 1100 P.N.B. BUILDING, PHILA, PA 19107, USA.

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JUDGES: HALL, JR.

OPINIONBY: BY THE COURT; WILLIAM F. HALL, JR.

OPINION: MEMORANDUM AND ORDER

WILLIAM F. HALL, JR

UNITED STATES MAGISTRATE JUDGE

Presently before the court is Defendant National Union Fire Insurance Company's ("National Union") motion for a **protective order** precluding the depositions of Maurice and Jeffrey Greenberg and Financial Institutions Reserve Risk Retention Group, Inc.'s ("FIRG") opposition [*3] thereto. Also before the court is FIRG's, motion for a **protective order** precluding the depositions of the FIRG Executive Committee and National Union's opposition thereto. These motions can be considered together because they are substantially related in legal theory. For the reasons that follow, National Union's motion is granted, in part and denied, in part and FIRG's motion is granted, in part and denied, in part.

National Union moves for a **protective order** vacating the notices of depositions dated December 30, 1991 for Maurice ("Hank") Greenberg, Chairman of the Board and Chief Executive Officer of American International Group, Inc. ("AIG") n1 a corporate affiliate of National Union and Jeffrey W. Greenberg, who is the Chairman of National Union and was at the relevant time, President of National Union n2. National Union also moves the court to preclude FIRG from taking the depositions of Maurice and Jeffrey Greenberg in this action because according to National Union, neither were involved in the underlying First Fidelity Bancorporation ("FFB") claim nor National Union's treatment of that claim and thus their depositions were noticed strictly for harassment purposes n3. [*4]

depositions were notic			ma thas their	
	Footnotes			
n1 AIG is not a party	to this litigation.			
n2 Maurice Greenberg of Pittsburgh, Pa. is on Declaration of Maurice	e of over 300 subsic	liaries and affilia		any
n3 Messrs. Greenberg	have submitted decl	arations.		
	End Footnates			

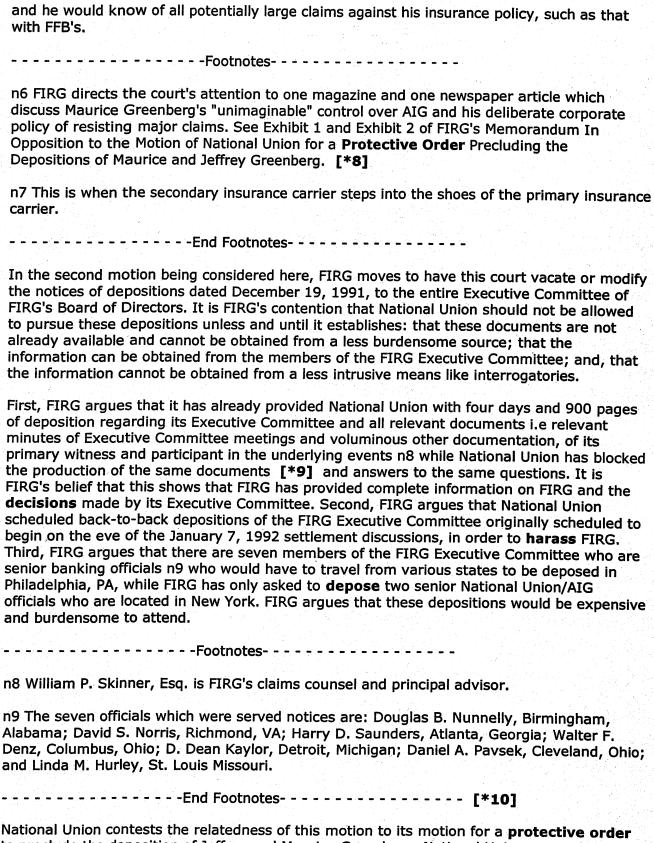
National Union argues that FIRG should be precluded from taking these depositions unless and until it **deposes** lower level employees of National Union who were previously served notice for deposition and FIRG demonstrates that after deposing these other individuals it has a specific need to **depose** Maurice and/or Jeffrey Greenberg. National Union claims that in its response to FFB's Second Set of Interrogatories it stated that Jeffrey Greenberg did not discuss or communicate in writing with any person about the underlying securities litigation, National Union's settlement or FFB's claim for reimbursement n4. National Union further claims to have agreed to produce the people who did make such communications [*5] and has produced volumes of documentary evidence. It is National Union's contention that the only communication that Jeffrey Greenberg had with FIRG was about the ongoing insurance arrangement between FIRG and National Union, but not about the FFB claim and that this court has no jurisdiction to order discovery relating to the New York arbitration. Therefore, National Union believes that FIRG must make a showing of why the deposition is necessary.

written communications or disc	did name several individuals who did participate in such sussions. They are: Michael Mitrovic, Lena Mkhitarian, Thomas
Taylor, Marci Goldfarb, Jack Flu FitzSimons, Esq.	ing, Norma Stokes, Luke D. Lynch, Jr., Esq. and John H.
End	Footnotes
knowledge that is directly releve because he discussed FIRG's cl	er ego of National Union and that Jeffrey Greenberg has rant to FIRG's defense against National Union's cross-claim aims payment policies with FIRG representatives. In addition

knowledge that is directly relevant to FIRG's defense against National Union's cross-claim because he discussed FIRG's claims payment policies with FIRG representatives. In addition FIRG argues that the [*6] litigation involves the overall claims handling philosophy of National Union and AIG which are "inextricably intertwined". According to FIRG, for the practical purpose of discovering the contents of National Union's claim philosophy, National Union and AIG should be considered the same corporate entity because National Union is owned by AIG and the two share offices, personnel and procedures. n5 Further, FIRG contends that no rule precludes the depositions of important corporate executives and that a party seeking to block a deposition has a heavy burden.

	' 그리고 하다 하다 하다스 등학생들은 얼마 얼마를 잃었다.
그들은 사용 사진 교리 왕조 사진은 전기를 받으라고 됐다.	
n5 FIRG points to the July 18, 1991 deposition test	imony of Norma Stokes, an employee of
National Union's claims department, where Ms. Sto	kes is not clear which company she works
for and the testimony of Thomas Taylor who stated	that he is routinely shuffled between
National Union and AIG assignments.	그리는 그 그는 사람들이 가득하는 것이 되었다. 그런 말로 함께 함께 가는 것이 되었다. 그리는 그 그리는 그는 것이 되었다. 그런 그런 그런 그런 그런 것이 되었다.

More specifically, FIRG argues that Maurice Greenberg has knowledge of National Union's corporate claim handling policy which is directly relevant to the main issue [*7] in this case i.e whether National Union's decision not to contribute to the settlement of the underlying litigation was reasonable. Thus, according to FIRG, Maurice Greenberg's testimony as the creator and director of corporate policy makes his testimony relevant. n6 Additionally, FIRG argues that Jeffrey Greenberg's testimony is directly relevant to National Union's counterclaim that FIRG was attempting to force it to participate in an unreasonable settlement. FIRG contends that Jeffrey Greenberg met with FIRG's representatives and discussed FIRG's claim handling philosophy thus National Union could not have been surprised when FIRG "dropped down" n7 and contributed to FFB's settlement. FIRG also believes that Jeffrey Greenberg's testimony is relevant because he can testify as to National Union's claims philosophy: as the president of National Union he is responsible for the corporate policy executed by subordinates, for the exercise of overall managerial authority,



National Union contests the relatedness of this motion to its motion for a **protective order** to preclude the deposition of Jeffrey and Maurice Greenberg. National Union contends that its discovery of the FIRG Executive Committee is relevant because previous discovery has revealed the crucial role of FIRG's Executive Committee. It further contends that the people it proposes to **depose** are the very people that made the **decision** to "drop down" and contribute \$ 15 million to FFB's settlement of the underlying litigation after having reviewed

the merits of the underlying settlement thus these people played an integral, vital role in the underlying litigation. In addition, National Union argues that it would be preposterous to accept the word of only one witness as a true and complete statement of all FIRG representatives who were involved in the underlying litigation and that there is no case law that supports this position.

National Union does not believe that one witness could possibly be qualified to testify as to the thoughts and motivations of the Executive Committee members **decisions** particularly where that witness advised that the Executive Committee rejected his advise with **[*11]** respect to the FFB claim on at least two separate occasions. National Union further contends that notices of the depositions were not served to **harass** FIRG because notices were originally served in February, 1991 n10, rescheduled to January, 1992 before the settlement conference and that after the settlement conference was scheduled it honored FIRG's request to reschedule the depositions for February, 1992. Finally, National Union contends that the depositions should take place in Philadelphia because in reality FIRG is collaborating with the plaintiff and against FFB in this action and because FIRG claims that it has been subrogated to FFB's right to recover against National Union then FIRG has acceded to FFB's choice of forum and cannot be upset with this district for the depositions. According to National Union if Philadelphia is an inconvenient forum then at most FIRG should request a more convenient forum.

n10 The deposition notices show that the depositions	were originally scheduled for February,
1992 in Burlington, VT. See National Union's Exhibit (5. 그는 병교회 기가는 그는 제공 회사를 찾아왔다.
	[*12] *
The Federal Rules of Civil Procedure ("F.R.Civ. P."),	provides in pertinent part:

(c) **Protective Orders.** Upon motion by a **party** or the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a **party** or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the **party** seeking discovery; . . .

Fed. R. Civ. P. 26(c). Thus, **₹**it is in the Court's discretion to issue orders to protect **parties** in taking depositions. <u>In re Penn Cent. Securities Litigation</u>, 347 F. Supp. 1347 (D.C. Pa. 1972). It is highly unusual for a court to absolutely prohibit the taking of a deposition. The burden is on the **party** moving for the **protective order** to show [*13] "good cause" before their motion is granted. <u>Macario v. Pratt and Whitney Canada, Inc., No. 90-3906, 1990 U.S. Dist. LEXIS 18375</u>, at * 3 (E.D. Pa. Feb. 21, 1991). The movant cannot just make "broad allegations of harm, unsubstantiated by specific examples or articulated reasoning" but must demonstrate that there is a particular need for the protection due to the possibility of significant harm. <u>Cipollone v. Liggett Group</u>, Inc., 822 F.2d 335, 343 (3d Cir. 1987), cert denied, <u>484 U.S. 976 (1987)</u>.

The liberal rules of discovery require that National Union make a strong showing before FIRG is denied its right to take the depositions of Maurice Greenberg and Jeffrey Greenberg. Fed. R. Civ. P. 26(c). First, this court does not agree that the depositions of Maurice and Jeffrey Greenberg are precluded simply because they are high ranking executives. Second, Messrs. Greenberg's depositions are relevant in that they "appear[] reasonably calculated to lead to the discovery of admissible evidence." See Fed. R. Civ. P. 26(b)(1). With respect to Maurice Greenberg's deposition, **₹**it is true that a request for nonparty discovery requires [*14] a stronger showing of relevance than for simple party discovery. Stamy v. Packer, 138 F.R.D. 412, 419 (D.C. N.J. 1990). However, it is also true that for discovery purposes relevancy is broadly construed and is not limited to the precise issues set forth in the pleadings or to the merits of the case. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978). Maurice Greenberg can contribute information about AIG and National Union's claims handling philosophy where there are some valid questions of the exact corporate management relationship between National Union and AIG. Similarly, this court is not convinced that Jeffrey Greenberg was not involved in the underlying litigation and thus is unable to contribute any relevant information to the litigation. Jeffrey Greenberg was the president of National Union during the relevant time period. It is difficult to accept the contention that Jeffrey Greenberg does not have knowledge of the policy settlement claim which National Union at times has characterized as one of the largest of its kind.

National Union has named eight individuals who it believes have knowledge of the underlying litigation. [*15] Some of these people have already been deposed in this litigation n11. To the extent that the information FIRG seeks goes beyond the information these deponents have already testified to, FIRG is entitled to the discovery of Maurice and Jeffrey Greenberg. In any event, FIRG is entitled to an opportunity to test Messrs. Greenberg's alleged lack of knowledge. Less v. Taber Instrument Corp., 53 F.R.D. 645, 647 (W.D.N.Y. 1971). However, the court believes that FIRG should, before it attempts to depose Maurice or Jeffrey Greenberg, first attempt to depose the lower level employees named ny National Union who were not already deposed in this litigation. Travelers Rental Co. v. Ford Motor Co., 116 F.R.D. 140, 141-2 (D. Mass. 1987) (the court allowed the deposition of high ranking executives to go forward after the plaintiff first deposed five lower level employees whose testimony proved unsatisfactory). If, after taking the other depositions FIRG is still not satisfied and still feels that it needs the testimony of Maurice and Jeffrey Greenberg, FIRG may then schedule their depositions.

	Footnotes-		
from lot	hn H. Fitzsimons, ESO.	y 7, 1992, FIRG filed a Mr. Fitzsimons is one o underlying securities li	motion to compel deposition f the parties who National tigation.
	End Footnote	es	[*16]

We will now address FIRG's motion for a **protective order** to vacate or modify the depositions of the FIRG Executive Committee members. This court agrees that National Union, is entitled to more than one deposition of FIRG's primary witness, William Skinner, Esquire. However, it is also true that National Union could possibly obtain the same information through a less burdensome and intrusive means. These are **high ranking** bank officials who are being asked to make themselves available for countless days of discovery. National Union should either attempt to obtain the information from written depositions or by written interrogatories. If this proves to be insufficient National Union should narrow the scope of this requested discovery and reschedule the oral depositions of the FIRG Executive Committee members.

Assuming these depositions become necessary, the court does not agree that FIRG having acceded to the plaintiff's choice of forum cannot object to their Executive Committee being

deposed in Philadelphia. Fit is within the court's discretion to designate the appropriate location for a deposition. Fed. R. Civ. P. 26(c)(2). Cases have held that as a general rule, if a deponent [*17] lives a substantial distance from the deposing party's residence, the deposing party should be required to take the deposition at a location in the vicinity in which the deponent resides. General Leasing Company v. Lawrence Photo-Graphic Supply, Inc., 84 F.R.D. 130, 131 (W.D. Mo. 1979); see also, Continental Federal S & L Ass'n v. Delta Corp., 71 F.R.D. 697 (W.D. Okla. 1976) (the court noted that although the federal rules do not prevent the plaintiff from designating any place he chooses for taking defendant's deposition it is presumed that the defendant will be examined at his residence or at his place of business or employment). This will undoubtedly avoid the undue burden, expenses, and lost time from work due to traveling to the deposition site. Here, the deponents are not within close proximity to the designated location. See n7, infra. National Union should therefore reserve notice of depositions for a more convenient forum which shall be jointly designated by respective counsel. If counsel for the parties cannot agree to a mutually convenient location, the court will designated such a location.

An implementing order is attached [*18] hereto.

ORDER

AND NOW, this 4th day of February, 1992, it is ORDERED that:

- 1. upon consideration of defendant, National Union's motion for a protective order vacating the notices of deposition for Maurice Greenberg and Jeffrey Greenberg and National Union's motion to preclude the depositions of Maurice and Jeffrey Greenberg and FIRG's opposition thereto, the motion is GRANTED, in part and DENIED, in part. FIRG shall first depose lower level employees and then if these depositions prove insufficient, shall make application to court for permission to reschedule the depositions of Maurice Greenberg and Jeffrey Greenberg.
- 2. upon consideration of the defendant and cross-plaintiff FIRG's motion to vacate or modify the depositions of its Executive Committee and National Union's opposition thereto, the motion is GRANTED, in part and DENIED, in part without prejudice to a later application upon cause shown. National Union shall serve written interrogatories upon the Executive Committee members within 45 days. Should these interrogatories prove insufficient, National Union shall serve new notices upon the FIRG Executive Committee members for a deposition to take place [*19] at a more convenient forum to be jointly designated by respective counsel. Upon a failure to agree on a location which represents a mutually convenient forum, the court shall designate such a location.

BY THE COURT

WILLIAM F. HALL, JR, UNITED STATES MAGISTRATE JUDGE

Source: All Sources > Federal Legal - U.S. > Federal Cases, Combined Courts Terms: federal rules decisions depose high-ranking officer before other parties harass protective order (Edit

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EXHIBIT "H"

1998 U.S. Dist. LEXIS 3719, *

MARISOL A., by her next friend, Rev. Dr. James Alexander Forbes, Jr., et al., Plaintiffs, - against- RUDOLPH W. GIULIANI, Mayor of the City of New York, et al., Defendants.

95 Civ. 10533 (RJW)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

1998 U.S. Dist. LEXIS 3719

March 23, 1998, Decided March 23, 1998, Filed

DISPOSITION: [*1] City defendants' motion to quash notice of deposition and for **protective order** precluding deposition of Mayor Giuliani granted.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant city officials moved for an order quashing the notice of deposition of defendant mayor of the city and for a **protective order** precluding the deposition of the mayor pursuant to Fed. R. Civ. P. 26(c).

OVERVIEW: Plaintiff citizens sued city officials alleging systemic deficiencies in the Child Welfare Administration. Soon thereafter the mayor reorganized the Child Welfare Administration, making it a freestanding agency which reported directly to him. The citizens served the mayor with a notice to appear for deposition. The court granted the motion to quash the notice of deposition on the ground that the legal standard applicable to the deposition of high-ranking government officials was not met. First, the information the citizens sought from the deposition could have been obtained through other sources, and therefore the deposition would place an undue burden on an official who already had large demands on his time. Second, the mayor had not waived his executive privilege by issuing press releases or documents regarding the reorganization of the Child Welfare Administration.

OUTCOME: The court granted the city officials' motion to quash the notice of deposition and granted them a **protective order** precluding the deposition of the mayor.

CORE TERMS: deposition, high ranking, deliberative process, depose, notice, deposing, child welfare, personal knowledge, deliberative, government official, protective order, waived, motion to quash, discrepancy, relevant information, first-hand, deposed, prong, legal standard, precluding, unduly, global, discovery of admissible evidence, decisionmaker, predecisional, burdensome, privileged, normally, immunity, deponent

CORE CONCEPTS - + Hide Concepts

☐ Civil Procedure: Disclosure & Discovery: Undue Burden

★ Fed. R. Civ. P. 30(a) provides for broad access to persons during the discovery

process. **Parties**, however, may be limited in their pursuit of depositions under Fed. R. Civ. P. 26(c), which provides that courts can issue a **protective order** to prevent "undue burden" in the discovery process. While granting a **protective order** and quashing a deposition is the exception rather than the **rule**, the burden a deposition would place on a **high ranking** government official must be given special scrutiny.

Civil Procedure: Disclosure & Discovery: Relevance

Civil Procedure: Disclosure & Discovery: Undue Burden

Depositions of high level government officials are permitted upon a showing that: (1) the deposition is necessary in order to obtain relevant information that cannot be obtained from any other source and (2) the deposition would not significantly interfere with the ability of the official to perform his governmental duties. As a general proposition, high ranking government officials are not subject to depositions.

Civil Procedure: Disclosure & Discovery: Relevance

Civil Procedure : Disclosure & Discovery : Undue Burden

Courts, before permitting the involuntary deposition of a **high ranking** government official, require that the **party** seeking the deposition demonstrate that the official's testimony will likely lead to the discovery of admissible evidence and is essential to that **party's** case. If the information is available through alternative sources, courts discourage the deposing of high officials.

Civil Procedure: Disclosure & Discovery: Undue Burden

★ High ranking government officials are granted this limited immunity from being deposed when they have no personal knowledge to ensure that they have the time to dedicate to the performance of their governmental functions.

Civil Procedure: Disclosure & Discovery: Undue Burden

In weighing the concerns of those seeking depositions of government officials, courts must place "reasonable limits" so as to conserve the time and energies of public officials and prevent the disruption of the primary functions of the government.

Civil Procedure: Disclosure & Discovery: Privileged Matters

The deliberative process privilege, or executive privilege, protects the decisionmaking processes of the executive branch in order to safeguard the quality and integrity of governmental **decisions**. This privilege is premised on the notion that effective decisionmaking requires a free flow of information amongst government officials and that this free flow would be constrained if these communications had the potential to be revealed to outsiders.

Civil Procedure: Disclosure & Discovery: Privileged Matters

★The deliberative process privilege exists when communications are both (1) predecisional and (2) deliberative. Predecisional communications are those communications generated in order to assist the agency decisionmaker in making a decision. Deliberative communications are those relating to the process by which policies are formulated. Such communications are used to aid a decisionmaker in arriving at a policy decision.

Civil Procedure: Disclosure & Discovery: Privileged Matters

In addition to communications with others, the executive privilege extends to the mental processes by which an executive reaches a **decision**. The mental processes of executives should not be probed. Top executive officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions.

Civil Procedure: Disclosure & Discovery: Privileged Matters

Exceptions to the deliberative process privilege do exist. Where the decisionmaking process itself is the subject of the litigation, the deliberative privilege may not be raised as a bar against disclosure of critical information. The mental processes, which are normally privileged under the deliberative process privilege, may also be discoverable where there are allegations of misconduct or misbehavior. In some instances, even when the court recognizes that an exception to the deliberative process privilege must be given as the allegation is personal to the defendant, the court still does not allow for the probing of the mental processes of the deponent.

Civil Procedure: Disclosure & Discovery: Privileged Matters

*A deposition cannot be barred simply because a deponent may be asked about privileged information, but when no other information is sought from a deposition, this privilege can bar the deposition.

COUNSEL: For MARISOL A., LAWRENCE B., THOMAS C., SHAUNA D., OZZIE E., DARREN F., DAVID F., BILL G., VICTORIA G., BRANDON H., STEPHEN I., plaintiffs: David M. Brodsky, Schulte Roth & Zabel, New York, NY.

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For MARISOL A., LAWRENCE B., THOMAS C., SHAUNA D., OZZIE E., DARREN F., DAVID F., BILL G., VICTORIA G., BRANDON H., STEPHEN I., plaintiffs: Thomas F. Curnin, Cahill Gordon & Reindel, New York, NY.

For MARISOL A., LAWRENCE B., THOMAS C., SHAUNA D., OZZIE E., DAVID F., BILL G., VICTORIA G., BRANDON H., STEPHEN I., plaintiffs: Marcia Robinson Lowry, Rose E. Firestein, Children's Rights, Inc., New York, NY.

For DARREN F., plaintiff: Rose E. Firestein, Children's Rights, Inc., New York, NY.

For RUDOLPH W. GIULIANI, MARVA LIVINGSTON HAMMONS, NICHOLAS SCOPPETTA, defendants: Grace Goodman, Paul A. Crotty, Corporation Counsel of the City of NY, New York, NY.

For [*2] GEORGE E. PATAKI, BRIAN J. WING, defendants: Michael S. Popkin, Dennis C. Vacco, Attorney General of the State of NY, New York, NY.

JUDGES: Robert J. Ward, U.S.D.J.

OPINIONBY: Robert J. Ward

OPINION: MEMORANDUM DECISION AND ORDER

Defendants Rudolph W. Giuliani ("Mayor Giuliani" or "Mayor"), Marva Hammons, and Nicholas Scoppetta ("Commissioner Scoppetta" or "Scoppetta") (collectively referred to as "City defendants") move this Court for an order quashing the notice of deposition of Mayor Giuliani and for a protective order precluding the deposition of the Mayor pursuant to Fed. R. Civ. P. 26(c). For the following reasons, City defendants' motion is granted.

BACKGROUND

In December 1995, plaintiffs filed this action, alleging that systemic deficiencies in the Child Welfare Administration ("CWA") were endangering the well-being of thousands of children in the City of New York. Mayor Giuliani, on December 18, 1995, announced that CWA would be reorganized, and on January 10, 1996, "he created -- for the first time in the city's history -- a freestanding agency, reporting directly to him, that would be charged with, in his words, 'first, last, and always' protecting the children of this [*3] city." Honorable Rudolph W. Giuliani and Nicholas Scoppetta, Protecting the Children of New York: A Plan of Action for the Administration for Children's Services 6 (Dec. 19, 1996) (hereinafter "Protecting the Children of New York"). CWA was thereafter transformed into the New York City Administration for Children's Services ("ACS"), and Nicholas Scoppetta ("Commissioner Scoppetta" or "Scoppetta") became commissioner of this new agency on February 10, 1996. Although familiarity with the Court's earlier decisions in this action is assumed, the Court will summarize the facts relevant to the motion to quash the notice of deposition of Mayor Giuliani.

Discovery for this case has been ongoing. On January 16, 1998, City defendants represented that over 25,000 pages of documents have been produced. See King Decl. Supp. of City Defs.' Mot. to Quash and for a **Protective Order** Precluding the Deposition of Mayor Rudolph W. Giuliani P 11 ("King Decl."). Plaintiffs have also been provided access to an extensive list of knowledgeable persons for the purposes of depositions. Included among these are Commissioner Scoppetta, John Linder ("Linder") who was the consultant on ACS's reform plan, [*4] and many Assistant and Deputy Commissioners of ACS. In addition, on December 19, 1997, this Court denied City defendants' motion to quash the deposition of Howard Wilson ("Wilson"), the City's former Commissioner of Investigation.

After the death of Eliza Izquierdo, in November 1995, Mayor Giuliani asked Wilson to chair an inter-agency task force designed to review the operations of CWA and to recommend to the Mayor potential improvements to CWA. Giuliani Decl. Supp. of City Defs.' Motion to Quash and for a **Protective Order** Precluding the Deposition of Mayor Rudolph W. Giuliani P 3 ("Giuliani Decl."). In an oral ruling the Court denied defendants' motion to quash the deposition of Wilson, holding that Wilson's deposition "may include questions concerning the facts ascertained during his investigation of the former Child Welfare Administration, which led to public statements by Mayor Giuliani." Hearing Transcript of 12/19/97 at 40, line 7-10. Since Mayor Giuliani had made public comments regarding advice received from Wilson, which were reported in the press, this Court ordered that Wilson's deposition could include the factual underpinnings of these publicized recommendations and [*5] conclusions. Id. at 40.

Pursuant to **Rule** 30 of the Federal **Rules** of Civil Procedure, plaintiffs served Mayor Giulianl with a notice to appear for a deposition on December 23, 1997. In submissions to the Court and correspondence between the **parties**, plaintiffs claim that there are a variety of issues on which only Mayor Giuliani is qualified to present testimony. Among these are Mayor Giuliani's: (1) reasons for requesting Wilson to investigate CWA and the findings which Wilson presented to Mayor Giuliani; (2) reasons for ordering the creation of ACS; (3) retention of Linder to draft a reform plan for CWA; (4) involvement in the setting of policy for ACS; and (5) reasons for appointing Scoppetta as the first commissioner of ACS. Plaintiffs also wish to question Mayor Giuliani regarding an alleged discrepancy between Commissioner Scoppetta's testimony concerning the deficiencies existing in ACS when he became commissioner of the agency and Mayor Giuliani's public statements regarding the shortcomings of the agency. See Pls.' Mem. Opp. Mot. to Quash the Notice of Deposition of Mayor Rudolph W. Giuliani ("Pls.' Mem."); Letter from Marcia Robinson Lowry to the Court of 1/19/98 [*6] at 5-10 ("Pls.' Letter to Court"); King Decl. Ex. B: Letter from Marcia Robinson Lowry to Gail Rubin of 12/18/97 at 3-4 ("Pls.' Letter to Rubin").

The City defendants now ask the Court to quash the notice of deposition of Mayor Giuliani.

DISCUSSION

I. Deposition of High Level Government Official

A. Legal Standard

TRule 30 of the Federal **Rules** of Civil Procedure provides for broad access to persons during the discovery process. Fed. R. Civ. P. 30(a). **Parties**, however, may be limited in their pursuit of depositions under **Rule** 26(c), which provides that courts can issue a **protective order** to prevent "undue burden" in the discovery process. Fed. R. Civ. P. 26(c). While granting a **protective order** and quashing a deposition is the exception rather than the the burden a deposition would place on a **high ranking** government official must be given special scrutiny.

While case law in the Second Circuit is scant on the issue of deposing high ranking government officials, the Court finds the two prong test applied by both plaintiffs and city defendants to be the standard when evaluating deposition notices of high ranking officials. *Depositions of high level government [*7] officials are permitted upon a showing that: (1) the deposition is necessary in order to obtain relevant information that cannot be obtained from any other source and (2) the deposition would not significantly interfere with the ability of the official to perform his governmental duties. See Martin v. Valley Nat'l Bank, 140 F.R.D. 291, 314 (S.D.N.Y. 1991); see also Sanstrom v. Rosa, 1996 U.S. Dist. LEXIS 11923, *11-13 (S.D.N.Y. Aug. 16, 1996) (permitting the deposition of Governor Cuomo, after his governorship ended, because he possessed particular information necessary to the case that could not reasonably be obtained by other discovery devices). As a general proposition, high ranking government officials are not subject to depositions. See National Nutritional Foods Ass'n v. F.D.A., 491 F.2d 1141, 1144-46 (2d Cir.), cert. denied, 419 U.S. 874, 42 L. Ed. 2d 113, 95 S. Ct. 135 (1974); Simplex Time Recorder Co. v. Secretary of Labor, 247 U.S. App. D.C. 85, 766 F.2d 575, 586-87 (D.C. Cir. 1985); Church of Scientology v. I.R.S., 138 F.R.D. 9, 12 (D. Mass. 1990).

The first prong of this standard, which requires that the deposition be necessary to obtain relevant [*8] information not available from other sources, is strictly imposed. *Courts, before permitting the involuntary deposition of a **high ranking** government official, require that the **party** seeking the deposition demonstrate that the official's testimony will "likely lead to the discovery of admissible evidence and is essential to that **party's** case." Warzon v. Drew, 155 F.R.D. 183, 185 (E.D. Wis. 1994) (citing Sweeney v. Bond, 669 F.2d 542, 546 (8th Cir.), cert. denied, 459 U.S. 878 (1982)). If the information is available through alternative sources, courts discourage the deposing of high officials. Id.

Further, when applying the first prong, courts only permit the deposition of a **high ranking** government official if he has unique personal knowledge that cannot be obtained elsewhere. For example, in L.D. Leasing Corp., Inc. v. Crimaldi, the court granted a **protective order** prohibiting the deposition of then Mayor David Dinkins ("Mayor Dinkins"). 1992 U.S. Dist. LEXIS 18683, *3-4 (E.D.N.Y. Dec. 1, 1992). In quashing the notice of deposition of Mayor Dinkins, the court found that: (1) Mayor Dinkins had no first-hand knowledge of the information being sought; (2) several [*9] key individuals had already been deposed; and (3) the examination with regard to a Local Law is the type of mental probing of officials that is prohibited. Id. The court held that, "in general, a **party** may only obtain the deposition of a high-level government official by showing that official has particularized first-hand knowledge that cannot be obtained from any other source." Id. at *2-3 (citations omitted).

In a similar case, a court suppressed the deposition of the Mayor of Philadelphia. <u>Hankins v. City of Philadelphia, 1996 U.S. Dist. LEXIS 13314 (E.D. Pa. 1996).</u> The court placed the burden on those seeking the deposition to "demonstrate that [the official's] testimony is

likely to lead to the discovery of admissible evidence, is essential to that **party's** case and that this evidence is not available through any alternative source or less burdensome means." Id. at *3-4 (citations omitted). While the Mayor of Philadelphia was one of three members of the City's Administrative Board, which approved changes to job requirements, the court found that the he had no unique personal knowledge of the particular reasons for the proposed changes. Id. ("**High ranking [*10]** government officials are generally entitled to limited immunity from being deposed concerning matters about which they have no unique personal knowledge.") (citations omitted).

*High ranking government officials are granted this limited immunity from being deposed when they have no personal knowledge to ensure that they have the time to dedicate to the performance of their governmental functions. See Warzon, 155 F.R.D. at 185; In re U.S., 985 F.2d 510, 512 (11th Cir.), cert. denied, 510 U.S. 989 (1993); Kyle Eng'g Co. v. Kleppe, 600 F.2d 226, 231-32 (9th Cir. 1979). "If the head of a government agency were subject to having his deposition taken concerning any litigation affecting his agency . . ., we would find that the heads of government departments and members of the President's Cabinet would be spending their time giving depositions and would have no opportunity to perform their functions." Capitol Vending Co. v. Baker, 36 F.R.D. 45, 46 (D.D.C. 1964); see also Church of Scientology, 138 F.R.D. at 12. Fin weighing the concerns of those seeking depositions of government officials, courts must place "reasonable limits" so as to conserve the time and energies [*11] of public officials and prevent the disruption of the primary functions of the government. Community Fed. Sav. and Loan Ass'n v. Federal Home Loan Bank Bd., 96 F.R.D. 619, 621 (D.D.C. 1983); Wirtz v. Local 30, Int'l Union of Operating Eng'rs, 34 F.R.D. 13, 14 (S.D.N.Y. 1963) ("Common sense suggests that a member of the Cabinet and the administrative head of a large executive department should not be called upon personally to give testimony by deposition, either in New York or elsewhere, unless a clear showing is made that such a proceeding is essential to prevent prejudice or injustice to the party who would require it.").

B. The Standard as Applied to Plaintiffs' Request to Depose Mayor Giuliani

After reviewing plaintiffs' reasons for requesting the deposition of Mayor Giuliani, the Court finds that the legal standard applicable to **high ranking** government officials is not met. The information plaintiffs seek from the deposition of the Mayor can be obtained through other sources, and therefore the deposition would place an undue burden on an official who already has large demands on his time. n1

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The Court will briefly outline the issues plaintiffs would like to question the Mayor about and explain why they do not warrant his deposition. First, plaintiffs indicate that they wish to depose Mayor Giuliani about his reasons for asking Wilson to investigate CWA and the findings which Wilson presented to the Mayor. See Pls.' Letter to Rubin at 3. Since this Court allowed Wilson's deposition to go forward, it appears obvious that such information can be gathered from him. Deposing the Mayor on this basis would be unduly burdensome as any relevant information regarding Wilson's investigation can be obtained from an alternative source, Wilson himself.

Second, plaintiffs indicate their desire to **depose** Mayor Giuliani regarding his retention of Linder to draft a reform plan for CWA. See Pls.' Letter to Rubin at 3. Plaintiffs have already

been given the opportunity to **depose** Linder, and it is clear to the Court that any information regarding recommendations made to the Mayor by Linder could be obtained from Linder. It would be a burden to a **high ranking** official to require his deposition on subject matter that can be obtained from another source.

Third, plaintiffs attempt to [*13] demonstrate a discrepancy between Commissioner Scoppetta's deposition testimony and Mayor Giuliani's public statements regarding the condition of the agency. Pls.' Mem. at 8-10; Pls.' Letter to Court at 5-6. This Court has reviewed the first two hundred pages of Commissioner Scoppetta's deposition transcript and the newspaper and television reports featuring the Mayor's comments on child welfare. See King Reply Decl. Supp. of City Defs.' Mot. to Quash and for a Protective Order Precluding the Deposition of Mayor Rudolph W. Giuliani Ex. A ("King Reply Decl."); Peters Decl. Supp. of Pls.' Mem. Opp. Mot. to Quash the Notice of Deposition of Mayor Rudolph W. Giuliani Ex. F ("Peters Decl."). The Court is in agreement with City defendants that Commissioner Scoppetta's statements do not contradict those of the Mayor, nor do they exhibit an incongruity between the positions of the Mayor and Scoppetta with regard to child welfare in New York City. When questioned regarding specific areas of CWA or ACS, Scoppetta did not always indicate that the area was below legal standards or requirements or that the functions within the agency area were inadequate. He did acknowledge, however, the "ills [*14] of the agency" and that "Child Welfare needed a lot of attention." King Reply Decl. Ex. A: Scoppetta's Dep. at 13. Further, Scoppetta stated in the affirmative that there were unaddressed problems within ACS as of February 1996. King Reply Decl. Ex. A: Scoppetta's Dep. at 33. Scoppetta acknowledged that he was concerned with improving most areas within ACS's domain and that a global problem did exist.

As plaintiffs point out, Mayor Giuliani acknowledged "widespread problems" within the agency. See Pls.' Mem. at 9. But, plaintiffs also state that the "topics about which [they] seek to depose Mayor Giuliani do not involve the specific day-to-day-operation of ACS, but rather more global issues." Pls.' Mem. at 13. The Court does not find any inconsistencies between the Mayor's global statements, about the agency as a whole, in the press and those made by Scoppetta in his deposition. Both the Mayor's public statements and Scoppetta's deposition testimony highlight that general problems existed in the area of child welfare. There is no divergence since the Mayor did not comment on the specific areas within the agency. While Scoppetta was unable to comment as to the effectiveness of [*15] every specific area within the purview of ACS, this provides no reason for deposing Giuliani. Further, the Mayor clearly states in his affidavit that he does not have first-hand knowledge of the factual affairs of ACS, so it is highly unlikely that the Mayor would be in a better position than Scoppetta to comment on the specific areas of ACS that plaintiffs refer to when attempting to show a schism between the Mayor and Scoppetta. n2 See Giuliani Decl. P 6-8. Plaintiffs have put forth no evidence showing contradictions, nor do they offer any evidence indicating the Mayor's testimony will add crucial information to that already received. As the plaintiffs have already been given access to government officials better able to provide the information plaintiffs seek, including Scoppetta and the Assistant and Deputy Commissioners, the Court finds no reason to allow the deposition of Mayor Giuliani to go forward.

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n2 If the Court is to believe plaintiffs when they state that the data from the Mayor, then the information on which plaintiff between the Mayor and Scoppetta is wholly unfounded. Plain Scoppetta's lack of knowledge on specific areas of ACS democrations at 8-9. There is no discrepancy, on the contratte overall problems facing the agency but did not recall speas family preservation services and preventive services.	ntiffs attempt to assert that nonstrates a discrepancy in views. rary, Scoppetta has acknowledged

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Fourth, plaintiffs claim that they need to **depose** the Mayor in order to learn his reasons for ordering the creation of ACS. Plaintiffs argue that the factors involved in initiating a reform plan are necessary for plaintiffs to determine the durability of the reform. See Pls.' Mem. at 7. As the Mayor has indicated, any facts on which he based the need for reform were facts garnered from others, specifically from Wilson or Scoppetta. See Giuliani Decl. P 6-7. In addition, as is discussed below, any new information that Mayor Giuliani could possibly supply to plaintiffs is subject to the executive privilege. n3

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Plaintiffs have failed to establish that the deposition of Mayor Giuliani is necessary to obtain information that is not available from any other source. Further, deposing the Mayor on the bases that plaintiffs assert would unduly burden an official whose duty is not just [*17] to set the policy of ACS, as plaintiffs point out, but to be the policy maker for the city as a whole. It would be improper to **depose** the Mayor regarding every topic that he at some point in time addressed in a public statement, and as he has no personal or unique knowledge regarding child welfare, this case should be no exception. Allowing for depositions where no personal knowledge existed would open up a floodgate of depositions, consuming much of the Mayor's time -- a clear interference with his ability to perform his governmental functions.

II. Executive Privilege

A. Legal Standard

City defendants claim that much of the information plaintiffs seek is subject to the executive privilege. The deliberative process privilege, or executive privilege, "protects the decisionmaking processes of the executive branch in order to safeguard the quality and integrity of governmental decisions." Hopkins v. H.U.D., 929 F.2d 81, 84 (2d Cir. 1991); also NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 44 L. Ed. 2d 29, 95 S. Ct. 1504 (1975); Local 3, Int'l Brotherhood of Electrical Workers, AFL-CIO v. NLRB, 845 F.2d 1177, 1180 (2d Cir. 1988); New York City Managerial [*18] Employee Ass'n v. Dinkins, 807 F. Supp. 955, 956 (S.D.N.Y. 1992); Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324 (D.D.C. 1966), aff'd, 128 U.S. App. D.C. 10, 384 F.2d 979 (D.C. Cir.), cert. denied, 389 U.S. 952, 19 L. Ed. 2d 361, 88 S. Ct. 334 (1967). This privilege is premised on the notion that effective decisionmaking requires a free flow of information amongst government officials and that this free flow would be constrained if these communications had the potential to be revealed to outsiders. New York City Managerial Employee Ass'n, 807 F. Supp. at 956-57 (citing In re Franklin Nat'l Bank Sec. Litig., 478 F. Supp. 577, 580-81 (E.D.N.Y. 1979); Archer v. Cirrincione, 722 F. Supp. 1118, 1122 (S.D.N.Y. 1989)); see also Carl Zeiss Stiftung, 40 F.R.D. at 324-25.

The deliberative process privilege exists when communications are both (1) predecisional and (2) deliberative. Hopkins, 929 F.2d at 84; New York City Managerial Employee Ass'n, 807 F. Supp. at 957. Predecisional communications are those communications generated in order to assist the agency decisionmaker in making a decision. See Hopkins, 929 F.2d at 84; New York [*19] City Managerial Employee Ass'n, 807 F. Supp. at 957. Deliberative communications are those relating to the process by which policies are formulated. See Hopkins, 929 F.2d at 84; New York City Managerial Employee Ass'n, 807 F. Supp. at 957. Such communications are used to aid a decisionmaker in arriving at a policy decision.

★In addition to communications with others, the executive privilege extends to the mental processes by which an executive reaches a **decision**. The Supreme Court has clearly stated that the mental processes of executives should not be probed. See <u>United States v. Morgan</u>, that the mental processes of executives should not be probed. See <u>United States v. Morgan</u>, that the integrity of the <u>313 U.S. 409, 422, 85 L. Ed. 1429, 61 S. Ct. 999 (1941)</u> (holding that "the integrity of the administrative process must be [] respected," and therefore discouraged the practice of calling high level officials as witnesses); Morgan v. United States, 304 U.S. 1, 18, 82 L. Ed. (1129, 58 S. Ct. 773, 58 S. Ct. 999 (1938) (recognizing that it is "not the function of the court to probe the mental processes of the Secretary [of Agriculture] in reaching his conclusions"); see also Carl Zeiss Stiftung, 40 F.R.D. at 325-26. "Top executive [] officials should not, absent extraordinary [*20] circumstances, be called to testify regarding their reasons for taking official actions." Simplex Time Recorder Co., 766 F.2d at 586.

Exceptions to the deliberative process privilege do exist. "Where the decision-making process itself is the subject of the litigation, the deliberative privilege may not be raised as a bar against disclosure of critical information." Burka v. New York City Transit Authority, 110 F.R.D. 660, 667 (S.D.N.Y. 1986). The mental processes, which are normally privileged under the deliberative process privilege, may also be discoverable where there are allegations of misconduct or misbehavior. United States v. American Telephone and Telegraph Co., 524 F. Supp. 1381, 1389 (D.D.C. 1981) (permitting staff members to be questioned regarding information normally considered deliberative privilege where the allegation involves inappropriate influence on the Commission in excess of the rules or customary practices of the Federal Communications Commission). In some instances, even when the court recognizes that an exception to the deliberative process privilege must be given as the allegation is personal to the defendant, the court still does not allow for [*21] the probing of the mental processes of the deponent. See Union Sav. Bank v. Saxon, 209 F. Supp. 319, 319-20 (D.D.C. 1962) (permitting the deposition of the Comptroller of the Currency as he is accused of issuing a branch certificate to a bank on the basis of ex parte representations and a personal relationship between the Comptroller and the president of the bank).

This Court recognizes that **a deposition cannot be barred simply because a deponent may be asked about privileged information. See Sanstrom, 1996 U.S. Dist. LEXIS 11923, *14 ("the mere fact that a witness may be asked questions that seek to elicit privileged matter does not provide a colorable basis for precluding the entire deposition"). But, when no other information is sought from a deposition, this privilege can bar the deposition.

B. The Executive Privilege of Mayor Giuliani

The Court now turns to the few assertions plaintiffs put forth as reasons for deposing the Mayor which this Court finds barred by the executive privilege.

Plaintiffs seek to **depose** the Mayor regarding both his reasons for creating ACS and for appointing Scoppetta as its first commissioner. Pls.' Mem. at 4; Pls.' Letter to Court [*22] at 5-7. These **decisions** involve both factual underpinnings and the mental processes of the Mayor. This Court will take plaintiffs at their word that they "do not seek to probe the underlying mental processes that culminated in the Mayor's **decisions** regarding child welfare." See Pls.' Mem. at 12. That being the case, the Court finds no non-privileged information regarding the Mayor's **decisions** that cannot be obtained from alternative sources. As the Mayor has stated, any reasons for creating ACS are based on facts obtained from other individuals, primarily Wilson. Giuliani Decl. P 6-8. Therefore, the only additional information that plaintiffs could potentially garner from the Mayor involves the thought processes of the Mayor. Any examination by plaintiffs as to the Mayor's mental processes would be barred by the executive privilege.

This Court recognizes that the deliberative process privilege cannot be raised as a bar to all decisionmaking processes, especially when such processes are the subject of litigation.

Plaintiffs in the instant case, however, are not challenging the process by which decisions were made. Therefore, the Court finds no reason to overrule the deliberative [*23] privilege.

Further, the Mayor has not waived his executive privilege by issuing press releases or documents, including "Protecting the Children of New York: A Plan of Action for the Administration for Children's Services." Plaintiffs argue that "to the extent that executive privilege might have ever applied to these subjects, such privilege has been waived as a result of voluntary action on the part of defendants in making this information public." Pls.' Mem. at 12. None of the authority on which plaintiffs base their claim persuades this Court that the Mayor waived his executive privilege. The court in In re Sealed Case, found that the "release of a document only waives [the deliberative process privilege] for the document or information specifically released, and not for related materials." 326 U.S. App. D.C. 276, 121 F.3d 729, 741 (D.C. Cir. 1997). Accordingly, the Mayor's statements only waived the privilege with respect to the information provided in them, and clearly any additional underlying information which is not privileged can be obtained from other sources. n4

n4 "Protecting the Children of New York: A Plan of Action for the Administration for Children's Services," was a policy statement and plan of action issued jointly by Mayor Giuliani and Commissioner Scoppetta. Therefore, any information which plaintiffs seek regarding this document can be obtained from Scoppetta. Plaintiffs will still have access to the material, but are not permitted to unduly burden an additional high ranking government official.

----- [*24]

CONCLUSION

4.6)

For the foregoing reasons, City defendants' motion to quash the notice of deposition and for protective order precluding the deposition of Mayor Giuliani is granted.

It is so ordered.

Dated: New York, New York

March 23, 1998

Robert J. Ward

U.S.D.J.

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